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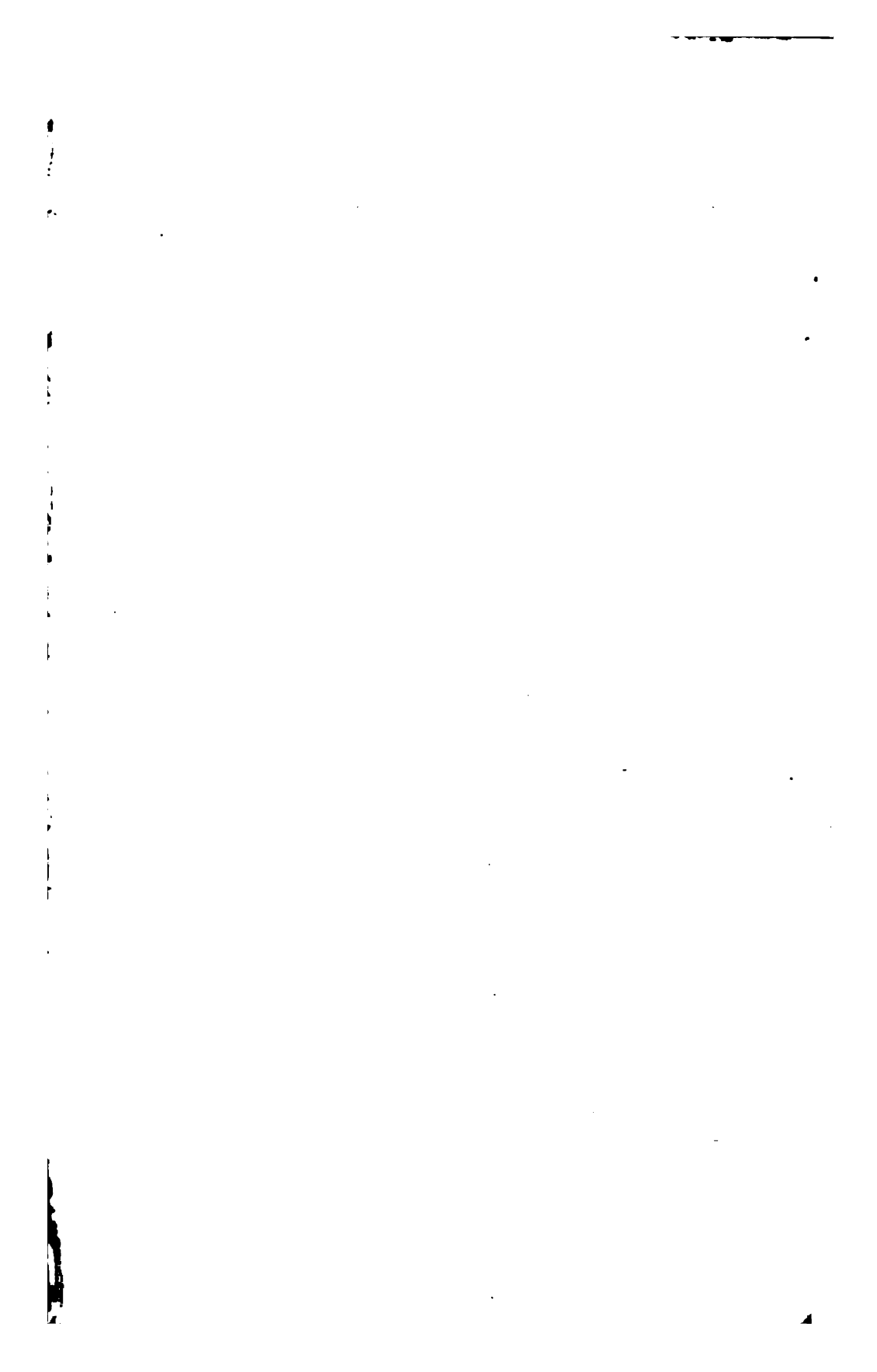
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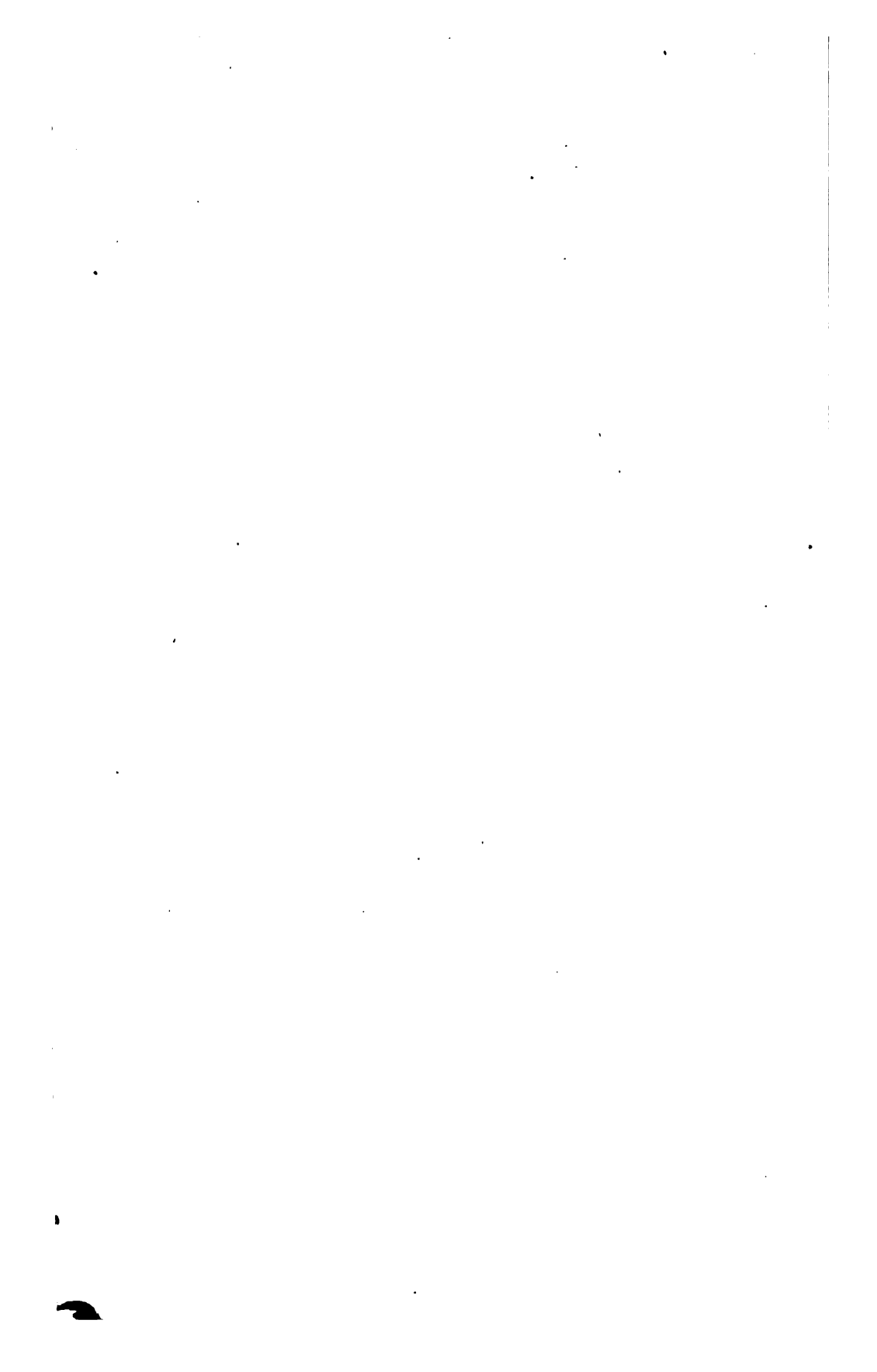
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REPORTS
OF
CASES ARGUED AND DETERMINED
IN THE
SUPREME COURT OF JUDICATURE
OF THE
STATE OF INDIANA,
WITH TABLES OF THE CASES REPORTED AND CASES
CITED AND AN INDEX.

By JOHN W. KERN,
OFFICIAL REPORTER.

VOL. 103,
CONTAINING CASES DECIDED AT THE MAY TERM, 1885, NOT
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JUDGES
OF THE
SUPREME COURT
OF THE
STATE OF INDIANA,
DURING THE TIME OF THESE REPORTS.

HON. JOSEPH A. S. MITCHELL.*†

HON. WILLIAM E. NIBLACK.‡

HON. GEORGE V. HOWK.‡

HON. BYRON K. ELLIOTT.§

HON. ALLEN ZOLLARS.‡

*Chief Justice at the May Term, 1885.

†Term of office commenced January 6th, 1885.

‡Term of office commenced January 1st, 1883.

§Term of office commenced January 3d, 1881.

OFFICERS
OF THE
SUPREME COURT.

CLERK,
SIMON P. SHEERIN.

SHERIFF,
JAMES ELDER.

LIBRARIAN,
CHARLES E. COX.



C A S E S

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF INDIANA,

AT INDIANAPOLIS, MAY TERM, 1885, IN THE SIXTY-NINTH
YEAR OF THE STATE.

No. 11,790.

BIRKE ET AL. v. ABBOTT ET AL.

JUDGMENTS.—*Real Estate.*—*Conveyance.*—*Agreement to Pay Liens.*—*Mortgage.*—*Sheriff's Sale.*—*Merger.*—*Subrogation.*—*Equity.*—*Contract.*—*Negligence.*—The owner of real estate, against which existed judgment liens, sold it to B., who assumed the payment of such judgments as a part of the purchase-price. Without paying such liens, B. quitclaimed the land to C., who did not assume them. C. mortgaged the land to X., and after the mortgage was recorded he conveyed it by warranty deed to W., who had no actual knowledge of the X. mortgage, and who assumed the payment of the judgments. Subsequently, W. discovered the mortgage, and instead of paying the judgments he allowed the land to go to sale on them and obtained sheriff's deeds.

Held, that by the assumption W. became the principal debtor and primarily liable to pay the judgments.

Held, also, that W. could not acquire title as against X. through the sales made on the judgments, nor will they be kept alive for the purpose of protecting the title which he acquired from his grantor.

Held, also, that a court of equity will not relieve W. from an injudicious contract, negligently made and fully executed with knowledge of all the facts.

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Birke et al. v. Abbott et al.

SAME.—Agreement of Grantee to Pay Encumbrances.—The liability of a grantee, who assumes prior encumbrances, depends upon his contract, and not upon the liability of his grantor.

SAME.—Subrogation.—A purchaser can not be subrogated to the benefit of an encumbrance which he has agreed to pay. *Peet v. Beers*, 4 Ind. 46, and *Ayers v. Adams*, 82 Ind. 109, are distinguished.

ELLIOTT, J., dissents.

From the Marion Superior Court.

F. Rand and *J. M. Winters*, for appellants.

F. J. Van Vorhis and *W. W. Spencer*, for appellees.

MITCHELL, C. J.—This was an action brought by the appellants to quiet their title to a certain fifty-five acre tract of land in Marion county.

There were answers and a cross complaint filed by Abbott, and upon issues joined on the complaint and cross complaint, the cause was submitted to the court for trial. A special finding of facts was made, upon which the court stated its conclusions of law adversely to the appellants.

All the facts necessary to develop the questions for decision are the following: In 1870, one Church owned the land in controversy, and, while owning it, two judgments were recovered against him in favor of the estate of Colley, one being a foreclosure against the land for something over \$1,000, the other a personal judgment for about \$600. Church sold and conveyed the land to Ferree, July 20th, 1870, the purchaser assuming in his deed the existing encumbrances above mentioned, as part of the purchase-price. On January 7th, 1873, Ferree sold and conveyed to Julius A. Kelly, who made a like assumption of the liens. Julius A. Kelly, on March 21st, 1873, having paid nothing on the encumbrances, quitclaimed the land to Lewis L. Kelly, in whose deed no assumption of the encumbrances appears, and who did not assume them in fact. On the same day on which the land was conveyed to Lewis L. Kelly, he executed a warranty mortgage on it to David B. Abbott, to secure a note of \$1,000 of even date therewith, payable in three months,

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with ten per cent. interest. This mortgage was duly placed of record on the 24th day of June, 1873. On the 30th day of July, 1873, Kelly sold and conveyed the land to Witt by deed containing covenants of warranty, the purchaser assuming in his deed, as part of the purchase-price, the payment of the above mentioned encumbrances to the Colley estate. Of the Abbott mortgage, Witt had, at the time he purchased and took his deed, no actual knowledge. At the time of the conveyance to Witt, the land had been sold on one of the Colley judgments, and a certificate of purchase was held by the purchaser. The amount for which it sold was expressly stipulated in the deed, and this sum with costs, together with the judgment on which no sale had been made, Witt stipulated to pay as part of the purchase-price. After the conveyance and assumption above mentioned, Witt discovered the Abbott mortgage, and instead of paying off the Colley encumbrances, he purchased and took an assignment of the certificate of sale on the one and permitted the land to go to sale on the other. Subsequently, he obtained sheriff's deeds on both. It was found that he took this course in order to protect his title. Kelly was and still is insolvent. The land was found to be worth about \$2,500. The Colley claims, with interest, amount to about the full value of the land, and the Abbott mortgage and interest amount to \$2,218. The appellants have by certain mesne conveyances succeeded to the rights of Witt, and are in possession.

The questions for consideration are: Witt having assumed the payment of the Colley judgments, could he acquire title as against Abbott by the subsequent sales made on those judgments, and, if he could not, will the judgments be kept alive for the purpose of protecting the title which he acquired from Kelly?

The appellants' counsel press the argument with much force: 1. That the sheriff's deeds to Witt, which were made in pursuance of the sales on the judgments mentioned, are effectual to cut out the Abbott mortgage, notwithstanding

the assumption contained in Witt's deed. 2. That, if this is not so, then Witt and those in privity with him are subrogated to the rights of the Colley estate, and the liens are on foot for their protection against the Abbott mortgage.

The propositions above stated involve substantially the same principles. If, under the circumstances, Witt, upon making payment, was not and could not be subrogated to the rights of the holder of the encumbrances, which he assumed to pay, then whether he paid them in pursuance of sheriff's sales or otherwise, they were extinguished, and no right can be predicated upon them, either as respects the title obtained under them or liens antedating the Abbott mortgage.

If, after obtaining the title from Kelly upon the agreement and consideration that he would pay off the Colley judgments, Witt could, upon discovering the Abbott mortgage, instead of paying the prior encumbrances, according to his agreement, purchase the certificate of sale on the one, and permit the land to go to sale on the other, and by that means acquire a title antedating the subsequent mortgage, it must be because he stood in such relation to the judgments and mortgage as that the doctrine of equitable subrogation would obtain for his benefit.

Ordinarily, any person may acquire title to land through the medium of a sheriff's sale, but there may be cases in which the purchaser, from his relation to the land sold, or to the judgment upon which the sale is made, is precluded from acquiring title under such judgment or sale.

Where the complete legal title is already in the purchaser, another title obtained through a judicial sale would merge in the prior title, if it appears that the title formerly held and that acquired by the sale are held in the same right, with no intervening title in a third person. If, however, the title so obtained was procured for the purpose of cutting off intervening titles or encumbrances, and to re-enforce a title then held, the subsequently acquired title will merge or be kept on

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foot, depending on the relation in which the purchaser stood to the judgment or sale on which the title is predicated.

If the purchaser was primarily liable to pay the encumbrance on account of which the sale was made, it would seem reasonably manifest that he could build up no additional title on his own default.

Where a legal title to the whole estate is claimed by one in possession, all subsequently acquired titles, co-extensive with or derived from the same source of that held, are presumptively merged. Equity will keep such subsequently acquired title alive, as against intervening encumbrances, only in case the purchaser owed no personal duty, or was under no binding obligation which required him to prevent such title from accruing.

Where, however, the purchaser of real estate, as part of the consideration for the purchase, by express contract stipulates that he will pay encumbrances on the land, he thereby comes under a personal obligation to pay such encumbrances. Thenceforth, as to all persons who were liable before him, he is the principal debtor, and they stand in the relation of sureties to him, and he could not, thereafter, defeat encumbrances which intervened between his title and other liens, which, upon a sufficient consideration, he had become personally bound to pay. *Winans v. Wilkie*, 41 Mich. 264; *Heim v. Vogel*, 69 Mo. 529; *Pomeroy Eq. Jur.*, section 797.

That the assumption of the Colley judgments, contained in the deed from Kelly to Witt, made the latter personally and primarily liable, is the established rule of decision in this State, and this contract enured to the benefit of the creditor as well as those previously liable for the debt. *Snyder v. Robinson*, 35 Ind. 311 (9 Am. R. 738); *Hill v. Minor*, 79 Ind. 48; *Josselyn v. Edwards*, 57 Ind. 212; *Rodenbarger v. Bramblett*, 78 Ind. 213; *Hoffman v. Risk*, 58 Ind. 113; *Davis v. Hardy*, 76 Ind. 272; *Ritter v. Cost*, 99 Ind. 80, and cases cited. And this is the rule generally prevailing. *Sheldon Subr.*, section 85; *Pomeroy Eq. Jur.*, section 1207.

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Some discussion may be found upon the question whether the mere fact that one has or claims title to and is in possession of land, should preclude him from making a purchase at a tax or other sale, in extinguishment of the title or claim of another with whom he stands in no contract or fiduciary relation; but, whatever may be said on that subject, it seems clear upon authority and well founded in equity, that where a purchaser of land upon which there are encumbrances, of all of which he has constructive notice, deliberately by contract assumes such relation to some of them, as that he becomes with reference to them the principal debtor, he can not, by the violation of his contract, predicate a title on the encumbrances which, upon a sufficient consideration, he contracted to discharge.

It is argued that because Kelly, the grantor of Witt, was not personally liable for the encumbrances which his grantee assumed, the assumption of the latter did not bind him personally, and that in consequence the rule above stated does not apply. In support of this proposition counsel rely upon *Trotter v. Hughes*, 12 N. Y. 74, *King v. Whitely*, 10 Paige, 465, *Pardee v. Trent*, 82 N. Y. 385, and *Vrooman v. Turner*, 69 N. Y. 280 (25 Am. R. 195). The holding in some of the cases cited is, in substance, that where the grantor in a deed is not personally liable for a debt, the payment of which the grantee assumes in the deed, such assumption amounts to nothing more than taking the title subject to the encumbrance, and is a personal contract between the grantor and grantee and does not enure to the benefit of the creditor whose debt is assumed.

It is said that as the grantor had no concern with, and was not liable for, the debts assumed, and had no interest in making provision for their payment, the court would not intend that it was the purpose of the parties to the contract that it should enure to the benefit of the creditors, and, therefore, the grantee did not become personally liable to them. This was the theory of *King v. Whitely*, *supra*, and *Trotter v.*

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Hughes, supra. In the later case of *Thorp v. Keokuk Coal Co.*, 48 N. Y. 253, the doctrine of these cases was considered and repudiated. In the still later case of *Vrooman v. Turner, supra*, some recognition was given the earlier cases; but in the case of *Pardee v. Treat, supra*, upon a consideration of all the previous cases, the rule was stated, in substance, that if the purchaser's contract of assumption was of such special character that the grantor remained primarily, and the grantee secondarily liable, then it did not enure to the benefit of the creditor.

The doctrine of *King v. Whitely* and *Trotter v. Hughes, supra*, has not been generally accepted, even in New York; the prevailing doctrine elsewhere, as stated in section 1207, Pomeroy Eq. Jur., where these cases are referred to, is, that the liability of a grantee who assumes prior encumbrances depends upon his contract, and not upon the liability of his grantor. The application of the rule contended for could make no difference in this case. Kelly, having executed a warranty mortgage to Abbott, had a direct interest in providing for the payment of the prior encumbrances. Although not personally liable, the land was chargeable in his hands with their payment. *Spray v. Rodman*, 43 Ind. 225; *Ather-ton v. Toney*, 43 Ind. 211.

It may be assumed that it was Kelly's purpose, in leaving in Witt's hands a sufficient sum out of the purchase-price to discharge the prior encumbrances, to secure their extinguishment for the benefit of his covenants in the Abbott mortgage. Abbott, by virtue of his warranty mortgage, had such an interest in, and benefit from, the contract of assumption by Witt, as that the money thereby reserved in his hands for the purpose of removing the prior encumbrances could not have been appropriated in any other direction while the contract of assumption remained in force. *Baring v. Moore*, 4 Paige, 166.

For the reasons already stated, by the payment of the encumbrances assumed, Witt was not in a situation to be sub-

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rogated to the rights of the Colley estate. Having assumed the payment of these encumbrances, he had no equity to have them kept on foot. 1 Jones Mort., section 743.

Subrogation takes place only where one has performed the obligation of another, or has paid his own debt, the burden of which has, for a valuable consideration, been assumed by another, or when he has paid encumbrances for the protection of his own title or interests, the payment of which he has not assumed by contract. The debtor upon whom rests the ultimate obligation of discharging the debt can not by his payment acquire any right of subrogation. A purchaser can not be subrogated to the benefit of an encumbrance which he has agreed to pay. Sheldon Subrogation, section 46.

Upon this subject a learned author has said : " If payment of the mortgage debt is made to the mortgagee or other holder of the mortgage, by a party who is himself personally and primarily liable for the debt, who is in any manner and by any means the actual primary debtor, whose duty it is to pay the debt absolutely and before all others, such payment operates *ipso facto* as an end of the mortgage, and the lien is completely destroyed. The party so paying is not subrogated to the rights of the mortgagee ; there is no equitable assignment to him of the mortgage security ; even if he should receive a formal assignment, the mortgage could not be thus kept alive, but would be wholly merged and ended." Pomeroy Eq. Jur., section 1213.

The same author, in a note to section 1206, lays down the rule in the following language : " Since such grantee thus becomes the principal debtor, primarily and absolutely liable for the debt, when he pays the mortgage it is completely extinguished. * * * He can not by any form of assignment, legal or equitable, or by subrogation, keep the mortgage alive as against other liens on the land." See, also, Pomeroy Eq. Jur., section 797.

The same rule was applied in *Carlton v. Jackson*, 121 Mass. 592. It was there held that when an encumbrance is paid

by one whose duty it was, by contract or otherwise, to pay it, such payment effected a release or discharge of the debt, and it could not thereafter be kept alive for any purpose. To the same effect are *Willson v. Burton*, 52 Vt. 394, *Heim v. Vogel*, 69 Mo. 529, and 1 Jones Mort., section 743.

By the contract of assumption the judgments in favor of the Colley estate became binding on Witt precisely as if they had been originally taken against him, and, as was said by HOWK, J., in *Ritter v. Cost*, 99 Ind. 80, when he paid them off, he merely paid his own personal debt, for which, under his contract, he became personally liable. And, as was said by ELLIOTT, J., in *Klippel v. Shields*, 90 Ind. 81, "Payment by one primarily liable as a judgment debtor extinguishes the judgment." Or, as was tersely said by THOMPSON, C. J., in *Abbott v. Kasson*, 72 Pa. St. 183, "It would be a novelty for a purchaser of land to keep on foot his own mortgage against his own estate."

It is said that the conclusion above stated will operate harshly against Witt and his grantees; that because he made the assumption contained in his deed without actual notice of the Abbott mortgage, the application of the principles announced will result in injury to him, while to keep the judgments alive will leave Abbott in no worse position than he was before; that Witt had no actual notice of the Abbott mortgage could only have resulted from his neglect to attend to what the record disclosed. Against negligence a court of equity can afford no relief. Besides, the record shows that before he paid his money on the Colley judgments he had discovered the Abbott mortgage, when, instead of taking steps to rescind the contract, he undertook to re-enforce his title by acquiring titles under the judgment which he contracted to pay. If he was entitled to any equitable relief at all, that relief could have been afforded when he discovered the mortgage in ignorance of which he avers the contract of assumption was made, but having executed the contract by paying the judgments, or doing that which was in legal effect the

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same as paying them, with knowledge of the mortgage, a court of equity can not now relieve him from an injudicious contract negligently made and fully executed with knowledge of the facts. Besides, Abbott was in no fault. He put his mortgage of record for the information of all who should thereafter deal with the land, and in law the record was effectual for that purpose; that he is placed in a more advantageous situation by reason of the contract of assumption between Kelly and Witt is not to be denied. But his mortgage being of record, we must assume that the parties to the contract of assumption made it with knowledge of the fact and of the benefit which would accrue to him, and we have no power now arbitrarily to say he shall not have it. The cases of *Peet v. Beers*, 4 Ind. 46, and *Ayers v. Adams*, 82 Ind. 109, are relied on as sustaining the view that a mortgage may be kept on foot by a purchaser who has assumed its payment. The decision in *Peet v. Beers*, *supra*, is apparently put on the ground that the purchaser, notwithstanding his assumption, stood in the situation of a surety to the mortgage assumed. Upon no other basis could the conclusion have been reached, that subrogation took place upon payment. Whatever may have been the rule at and before *Peet v. Beers*, *supra*, was decided, this court, as nearly all others, is now so thoroughly committed to the doctrine that the purchaser who assumes an encumbrance is the principal debtor, and the vendor or other person who was primarily liable is the surety, that it can not now recede from it. Of *Ayers v. Adams*, *supra*, it may be said, that the question does not seem to have been either presented or considered. It seems to have been conceded on all hands, that if what was received by the creditor constituted payment of the debt assumed, the purchaser was entitled to be subrogated.

The question is now distinctly presented, and we must accept the alternative of deciding whether or not a purchaser, who by his assumption makes a debt his own, can, after paying it off, keep it on foot, or whether he will be treated as

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having paid and discharged his own debt. We feel constrained to adopt the latter view.

We think the cases of *Peet v. Beers*, *supra*, and *Ayers v. Adams*, *supra*, are to be distinguished from the one before us, and that neither is, for the reasons above suggested, authority against the conclusion reached.

The judgment is affirmed, with costs.

Filed June 9, 1885; petition for a rehearing overruled Nov. 6, 1885.

DISSENTING OPINION.

ELLIOTT, J.—I concur in the conclusion that Birke could not acquire title under the sheriff's sale on the Colley judgments, but dissent from the conclusion that he could not hold and enforce them as liens against the Abbott mortgage.

I think that as the promise to pay the Colley judgments was solely in consideration that the promisor should acquire a clear title to the land purchased, and that as the consideration failed the promise should not be enforced in favor of the mortgagee Abbott. This conclusion does Abbott no injury, because it leaves him in the same condition he was at the time he took his mortgage, while the conclusion reached by the court puts him in a better condition at the expense of Birke, and this I respectfully affirm is not equitable. The rule adopted by the court enables a stranger to make a promise available which the party to whom it was made could not have enforced. But for the promise it is clear, under all the authorities, that the purchaser could have used the Colley judgments for the protection of his title against the Abbott mortgage, and that promise ought not to deprive him of this right, for the reason that he did not get the consideration on which it was made, namely, a good title. Time permits only a bare statement of the main proposition which constrains this dissent, although there are others that may be suggested.

Filed June 9, 1885.

 McCrory v. Anderson.

No. 9697.

MCCRORY v. ANDERSON.

APPEAL BOND.—*Parol Evidence of Filing and Approval.*—*Justice of the Peace.*—Upon appeal to the circuit court from a justice of the peace, the fact that the appeal bond was filed with and approved by the justice may be shown by parol, without a formal finding of such fact being first made by the court.

PLEA IN ABATEMENT.—*Misnomer.*—*Amendment.*—*Practice.*—A misnomer may be pleaded in abatement in this State; but such plea is of little value, as a mistake in a name, in a civil case, can be amended under section 396 of the civil code, and as the provisions of the English statute of 3 and 4 Wm. IV., c. 42, are substantially made applicable to criminal cases by sections 1742 and 1743 of the criminal code.

SAME.—An answer in abatement for misnomer is bad, if it fails to aver that the defendant had never been known or called by the name by which he is sued.

JUDICIAL KNOWLEDGE.—*Terms of Courts.*—The Supreme Court takes judicial knowledge of the terms of the circuit courts of this State.

JURIES.—*Act of April 15, 1881, Concerning.*—*Construction of.*—The act of April 15th, 1881, concerning juries, only fully repealed previous statutes on the same subject, when, from the lapse of time, or other kindred causes, all of its provisions became inconsistent with its declared object and purposes; and a jury drawn under the former law continued in existence until superseded by one drawn under the new law, unless its term of service had previously expired.

INSTRUCTIONS TO JURY.—*When Error Cured.*—An erroneous instruction is not cured by the subsequent giving of a correct one unless the former be withdrawn; but where the court substitutes and reads to the jury another series of instructions for the series first read, in which substituted series the error is corrected, this fact is equivalent to a withdrawal of the first series.

From the DeKalb Circuit Court.

J. E. Rose and E. D. Hartman, for appellant.

W. L. Penfield, for appellee.

NIBLACK, J.—Thomas P. Anderson commenced this action before a justice of the peace of DeKalb county, against Drucilla McClory upon a promissory note for \$100, payable twelve months after date, and purporting to have been executed by the latter on the 25th day of June, 1873.

The defendant answered under oath: *First.* That her real

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| 103 | 12 |
| 161 | 341 |

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and only name was Drucilla McCrory, and that it was not and never had been Drucilla McClory; wherefore she demanded that the suit should abate. *Secondly.* Denying the execution of the note. There was a finding and judgment for the defendant before the justice.

The plaintiff appealed to the circuit court, where there was found, amongst the papers in the cause, what purported to be an appeal bond signed by him, and one Miller as his surety, but there was nothing either contained in the transcript, or endorsed upon the bond, showing that the bond had been filed with, or approved by, the justice. The defendant, for that reason, moved to dismiss the appeal, but pending that motion, and as counter to it, the plaintiff asked leave to introduce parol evidence to prove that the bond had been both filed with, and approved by, the justice. This leave was granted, and, after hearing parol evidence as proposed, the circuit court overruled the motion to dismiss the appeal. A demurrer was then sustained to the answer in abatement, and when the cause was called for trial, which was on the 28th day of May, 1881, the defendant challenged the array of the jury, upon the ground that the jury had been selected under a statute which had been repealed by the act concerning the selection of juries, approved and declared to be in force on the 15th day of April, then immediately preceding. This challenge to the array was nevertheless overruled, and the trial proceeded, resulting in a verdict and judgment for the plaintiff for the amount claimed to be due upon the note.

It is first complained that the circuit court erred in refusing to dismiss the appeal taken from the judgment rendered by the justice, as herein above stated, upon the ground that it was not competent to hear parol evidence to supply the alleged omissions of the justice, and upon the further ground that the court ought to have first made a formal finding that the bond had been filed with, and approved by, the justice.

There was no error in the admission of the parol evidence.

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Miller v. O'Reilly, 84 Ind. 168. In a proceeding so entirely incidental and summary, a formal finding was unnecessary.

The evidence objected to is not in the record, and hence, as all the presumptions are in favor of the regularity of the proceedings below, we must assume that it was sufficient to justify the circuit court's refusal to dismiss the appeal.

The next complaint is that the circuit court erred in sustaining a demurrer to the answer in abatement.

By the common law the misnomer of the defendant might be pleaded in abatement, but by the statute of 3 and 4 William IV., c. 42, pleas in abatement for misnomer were abolished, and the defendant enabled to compel an amendment by the insertion of his real name if he chose to do so. 1 Chitty Plead. 266; 1 Saunders Plead. & Ev. 10. The decided cases in this State are not very explicit on the subject of misnomer, but the fair inference from our cases is that the common law rule is still recognized, and that a misnomer may still be pleaded in abatement. 1 Works Prac., section 505, and authorities cited. But, however that may be, an answer in abatement for a misnomer is now of very little practical value in this State, since a mistake in a name, in a civil case, can be readily and promptly amended under section 396 of the present civil code, and since the provisions of the English statute are substantially made applicable to criminal causes by sections 1742 and 1743 of our criminal code. The answer in abatement in this case was, in any event, bad for not averring that the defendant had never been known or called by the name of Drucilla McClory.

The challenge to the array of the jury was based upon the theory that the repeal of the law under which it was selected necessarily operated as a discharge of all juries drawn under that law, and that, consequently, the persons then called to serve as jurors were to be regarded as never having been legally selected to act in that capacity.

The sixth section of the act of April 15th, 1881, provided that jury commissioners for the year 1881 should be ap-

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pointed at the first term of the circuit court of each county which might be held after the act took effect, and we know judicially that no term of the DeKalb Circuit Court had intervened between the 15th day of April, 1881, and the term at which this cause was tried. Hence sufficient time had not elapsed to allow the new law to come into full operation in DeKalb county when the May term, 1881, of its circuit court convened. We regard the fair construction of this new law to be that it only fully repealed previous statutes on the same subject, when, from the lapse of time, or other kindred causes, all of its provisions became inconsistent with its declared object and purposes. The necessary inference from this construction is, that a jury, drawn under the former law, continued in existence as a lawfully selected jury until superseded by a jury drawn under the new law, unless its term of service had previously expired.

The circuit court, upon its own motion, first instructed the jury, in connection with other matters embraced within its general instructions, that upon the issue formed by the pleadings the burden of proof was upon the defendant.

After the jury had retired and remained in its room an hour or more, the foreman signified to the bailiff that a verdict had been agreed upon. This information was communicated to the court, whereupon the judge announced to the attorneys of the parties respectively that he thought he had made a mistake in instructing the jury that the burden of proof was on the defendant, and that he intended to change his instructions in that respect. He then took up his instructions, which were in writing, and by striking out some words and adding others, made them read that the burden of proof was upon the plaintiff. The judge then further announced to the attorneys that he intended to recall the jury to the court-room and re-read to it his instructions as thus modified. It was thereupon agreed by the attorneys of both parties that the judge might, instead of recalling the jury, go to the jury-

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room and re-read his instructions as amended. He then went into the jury-room and re-read his instructions, as they were above amended, to the jury, neither one of the parties, nor any of the attorneys, being present or within hearing distance at the time. The jury immediately thereafter returned into court the verdict which had been previously agreed upon, and which is the verdict upon which the judgment in this case was rendered.

It is earnestly, and with much elaboration in argument, insisted that the error into which the circuit court fell, by its instructions as first given, was not cured by the subsequent proceedings lastly above set forth.

It is true, as contended, that an erroneous instruction is not cured by the subsequent giving of a correct instruction covering the same subject, unless the erroneous instruction be either expressly or plainly withdrawn. *Buskirk Pr.* 289; *Kirland v. State*, 43 Ind. 146 (13 Am. R. 386); *Uhl v. Bingham*, 78 Ind. 365; *McCole v. Lochr*, 79 Ind. 430.

While the proceeding touching the amended instructions in this case does not afford a commendable precedent to be followed in similar cases, we do not feel at liberty to hold that the error in giving the court's first instructions was not fairly and substantially cured by the re-reading of the instructions as amended. The fair inference is that the jury understood the instructions, as re-read to it, to be a substitute for the instructions first given, and this substitution of one series of instructions for another ought, we think, to be regarded as the equivalent of an express withdrawal of the first series. We are strengthened in this conclusion by the very decided impression that the verdict was probably right upon the evidence.

The judgment is affirmed, with costs.

Filed Sept. 16, 1885.

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No. 11,287

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LANG, TREASURER, v. CLAPP, ADMINISTRATOR.

PRACTICE.—*Motion to Strike Out.*—*Bill of Exceptions.*—A motion to strike out a pleading must be made part of the record by bill of exceptions or order of court.

TAXES.—*Trust Estates.*—*Administrator.*—*Delinquent Taxes.*—*County Treasurer's Statement to Court.*—*Pleading.*—*Demurrer.*—Section 6443, R. S. 1881, requiring the county treasurer, upon the failure of an administrator, etc., to pay taxes due from the estate which he represents, to present a statement to the proper court, setting forth the facts and amount of such delinquency, does not deprive such administrator of the right to test the sufficiency of such facts by demurrer.

SAME.—*Special Assessment of Omitted Property.*—*Act of Dec. 21st, 1872.*—Special assessments of omitted property by the county auditor or treasurer, except for the current year, were not authorized by the assessment law of December 21st, 1872, or any of its amendments.

SAME.—*Act of March 29th, 1881.*—*Construction.*—Section 147 of the new tax law of March 29th, 1881 (sec. 6416, R. S. 1881), is only prospective in its operation, and does not authorize the county auditor to make a special assessment of omitted property for any year, or number of years, prior to its passage or taking effect.

From the Noble Circuit Court.

R. Lowry and H. G. Zimmerman, for appellant.

A. A. Chapin and R. P. Barr, for appellee.

HOWK, J.—Section 174 of "An act concerning taxation," approved and in force since March 29th, 1881, being section 6443, R. S. 1881, reads as follows:

"It shall be the duty of every administrator, executor, guardian, receiver, trustee, or the person having the property of any decedent, infant, idiot, or insane person in charge, to pay the taxes due upon the property of such decedent, ward, or party. In case of neglect to pay any instalment of taxes when due, when there is enough money on hand to pay the same, the county treasurer shall present to the circuit or other proper court of the county, at its next term thereafter, a brief statement, in writing, signed by him as such county treasurer,

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setting forth the facts and amount of such delinquency ; and such court shall at once issue an order directed to such delinquent, commanding him to show cause, within five days thereafter, why such taxes, penalty, and costs should not be paid ; and upon failure to show good and sufficient cause for such non-payment, the court shall order him to pay such taxes out of the assets in his hands belonging to the estate of said decedent, ward, or other person," etc.

Assuming to act under and pursuant to these statutory provisions, the appellant, Lang, as treasurer of Noble county, on the 28th day of March, 1883, presented to the court below a written statement signed by him, as such county treasurer, charging therein that the appellee, Clapp, as administrator of the estate of William M. Clapp, deceased, had neglected to pay the taxes due upon the property of his decedent, and the amount of such delinquency, and praying for the issue of an order, commanding him to show cause why such taxes should not be paid, etc. The appellee appeared, and his demurrer to appellant's written statement, for the want of sufficient facts therein, having been overruled by the court, he filed a verified answer in abatement of this suit or proceeding. The appellant's demurrer to appellee's answer was carried back and sustained by the court to his written statement, and, declining to amend or plead further, judgment was rendered against him for appellee's costs.

The first error of which the appellant complains in this court is the overruling of his motion to strike out the appellee's demurrer to his written statement or complaint. This motion was not made part of the record of this cause either by a bill of exceptions or by an order of court. It was not in writing, and the grounds of the motion are not stated in the transcript. Appellant's counsel claim, in argument, that the motion ought to have been sustained because, they say, "this is not a civil action, but a special proceeding. No pleadings are contemplated by the section of the statute (section 6443), under which the proceeding was instituted, other

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than the written statement filed by the treasurer, and the respondent's answer to the rule to show cause."

This question is not, we think, properly saved in or presented by the record of this cause, but, if it were, we would be of the opinion that appellee's demurrer was a proper pleading, and that the court did not err in refusing to strike it out. The statute requires the county treasurer to set forth the facts in his written statement, and does not deprive the administrator, even by implication, of the right to test the sufficiency of such facts in law by demurrer. If, however, it were conceded that the court had erred in overruling the motion to strike out appellee's demurrer, the appellant was not harmed by such ruling, as this demurrer was overruled by the court.

The second error complained of is assigned as follows: "The circuit erred in sustaining appellee's demurrer to the written statement filed in said matter by appellant." The transcript before us fails to show that the circuit court sustained appellee's demurrer to appellant's written statement or complaint; but it does show, on the contrary, that this demurrer was overruled by the court. The record shows that the appellant's demurrer to appellee's answer in abatement was sustained by the court to the written statement or complaint; but this ruling of the court has not been assigned here as error. Counsel on both sides, however, have briefed this cause as though the second error assigned correctly called in question the sufficiency of the facts, stated in appellant's written statement, to constitute a cause of action or valid claim against the estate of appellee's intestate. This question, therefore, we will consider and decide as if it were presented by a proper assignment of error.

In his written statement the appellant represented that he was, and had been since August 15th, 1881, the treasurer of Noble county; that the appellee was, and had been since January 20th, 1881, the administrator of the estate of William M. Clapp, "lately and for and during all the years hereinafter

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specified," a resident of Albion township, in Noble county, who died January 5th, 1881; that, on April 1st, 1877, William M. Clapp was the owner of personal property subject to taxation, in Noble county, of the fair cash value of \$35,825, and, on April 1st, 1878, he was the owner of personal property subject to taxation, in such county, of the fair cash value of \$40,976, and on April 1st, 1879, he was the owner of personal property subject to taxation in such county of the fair cash value of \$50,692, and on April 1st, 1880, he was the owner of personal property subject to taxation in such county of the fair cash value of \$60,594; that William M. Clapp did not make and deliver to the proper assessor in any such years a correct list of such property so held by him, but only returned for 1877 \$20,825, for 1878 \$20,976, for 1879 \$20,692, and for 1880 \$20,594, as the amount and value of such property so held by him as subject to taxation, and in consequence thereof the residue of such property, so owned by him, was omitted from the assessment book and tax duplicate, and no taxes were assessed or paid thereon for such years; that on March 15th, 1883, the auditor of Noble county was credibly informed, had reason to believe and discovered, that all of the property of William M. Clapp had not been assessed for such years, but that there was an omission from the assessment books and tax duplicates of each of such years of the amounts above set forth; that after having given the appellee written notice to appear before him on March 22d, 1883, and show cause, if any he could, why such omitted property should not be assessed and charged with the amount of taxes due thereon, and the appellee having failed to appear and show cause, the county auditor proceeded to and did assess such omitted property at its true cash value, and charged such property and the appellee, as such administrator, on the tax duplicate for the then current year, with the proper amount of taxes thereon; that, by reason of such assessment on such tax duplicate, then in the hands of appellant as such county treasurer for collection, there were due and unpaid by appellee, as such adminis-

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trator, taxes for State, county and other purposes, the following sums: For 1877 \$139, for 1878 \$300, for 1879 \$435, and for 1880 \$760, making a total sum of \$1,634; that the appellee had in his hands, as such administrator, as part of the assets of his decedent's estate, a large sum of money, to wit, \$10,000, and more than sufficient to pay and satisfy the aforesaid taxes; and that, since the making of such assessment, the appellant had demanded payment of such taxes from the appellee, who had failed and refused to pay the same, or any part thereof. Wherefore, etc.

Upon the foregoing statement of facts, it is manifest that the fundamental question for our decision may be thus stated: Is the special assessment of the personal property of William M. Clapp, deceased, made by the auditor of Noble county on March 15th, 1883, and charged on the 'tax duplicate against such decedent's estate, a valid, legal and binding assessment? In other words, was the county auditor authorized by the statute in force at the time to assess the omitted personal property of such decedent for the years specified in such assessment, which antedate the enactment and taking effect of such statute? If these questions must be answered in the negative, as we think they must, it is certain there is no error in the record of this cause which would authorize or justify the reversal of the judgment below.

It will be observed that the special assessment of the county auditor, mentioned and described in appellant's written statement of facts, covered and embraced each and all of the years 1877, 1878, 1879 and 1880. In each and all of those years the law of this State, regulating the assessment of property and the special assessment of omitted property for the purposes of taxation, was the act of December 21st, 1872, and its several amendments. 1 R. S. 1876, p. 72. This statute and its amendments, in so far as they provided for special assessments of omitted property, have been several times considered by this court. *Vogel v. Vogler*, 78 Ind. 353; *State, ex rel., v. Howard*, 80 Ind. 466; *Stockman v. Robbins*, 80

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Ind. 195; *Scott v. Town of Knightstown*, 84 Ind. 108; *Hamilton v. Amaden*, 88 Ind. 304. It will be seen from the cases cited that it has been uniformly held by this court that special assessments of omitted property by the county auditor or county treasurer, except for the current year, were not authorized by any of the provisions of the assessment law of December 21st, 1872, or of any of its amendments. We adhere to these decisions; and as it is shown by the appellant's written statement of facts that the special assessment of the omitted personal property of William M. Clapp, deceased, was made by the auditor of Noble county on the 15th day of March, 1883, we hold that such assessment was not authorized by the assessment law of December 21st, 1872, or any of its amendments.

Nearly two years prior to the making of such special assessment by the auditor of Noble county, to wit, on March 29th, 1881, the assessment law of Dec. 21st, 1872, and its amendments were repealed and superseded by the passage, approval and immediate taking effect of an act entitled "An act concerning taxation." Acts 1881, p. 611; sections 6269 to 6521, R. S. 1881. In section 147 of the above entitled act (section 6416, R. S. 1881), it is provided as follows: "Whenever the county auditor shall discover or receive credible information, or if he shall have reason to believe, that any real or personal property has, from any cause, been omitted in whole or in part in the assessment of any year or number of years from the assessment book, or from the tax duplicate, he shall proceed to correct the tax duplicate, and add such property thereto, with the proper valuation, and charge such property and the owner thereof with the proper amount of taxes thereon, to enable him to do which he is invested with all the powers of assessors under this act."

On behalf of the appellant, it is claimed that the special assessment of the omitted personal property of William M. Clapp, deceased, made by the auditor of Noble county, was authorized by the provisions quoted of section 6416 of the

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above entitled act of March 29th, 1881. We do not think so. The language and grammatical construction of the provisions quoted indicate clearly, as it seems to us, that they were to be prospective only in their operation, and not retroactive. It is a maxim of the law that statutes must be construed prospectively, unless they plainly import a different intention on the part of the Legislature. *Wilhite v. Hamrick*, 92 Ind. 594, and cases cited. There is nothing in the statutory provisions quoted which imports any intention on the part of the Legislature to authorize any county auditor to make a special assessment of omitted property for any year, or number of years, prior to the passage and taking effect of the above entitled act.

We are of opinion, therefore, that the special assessment of the omitted personal property of William M. Clapp, deceased, made by the auditor of Noble county, was wholly unauthorized by law, invalid and void.

The judgment is affirmed, with costs.

Filed Sept. 15, 1885.

No. 12,185.

BROWN ET AL. v. BROWN.

CONTRACT.—Equitable Mortgage.—Foreclosure.—Payment when Time not Fixed by Contract.—An instrument designated “memoranda of contract,” signed by S. B. and wife and E. B., provided that S. B. had previously obtained \$3,000 from E. B., with which he purchased certain described land, “the use and control of which we do hereby turn over to the said” E. B. “until sold, and when sold the \$3,000 above named, and one-half of the advance over, together with the \$3,000 that may be obtained on the sale of said land, we will pay to” E. B. It was stipulated that S. B. should put \$200 worth of improvements on the land, and that E. B. should pay the taxes and keep the farm in as good repair as when received; that in case E. B. should die “before the sale of the farm and the cancelling of this paper,” then the \$3,000 should be a gift to S. B., and the paper should be void. S. B. died without making the improve-

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ments or selling the land. Action by E. B. on the contract, with a prayer that the land be ordered sold and his claim paid out of the proceeds.

Held, that the instrument set out is an equitable mortgage, and that E. B. is entitled to have the land sold to pay the debt evidenced by it.

Held, also, that as no time was fixed for the payment of the money, the law made it the obligation of S. B. to pay it within a reasonable time.

From the Montgomery Circuit Court.

P. S. Kennedy, S. C. Kennedy, M. W. Bruner and E. C. Snyder, for appellants.

R. B. F. Peirce, W. T. Brush, T. H. Ristine and H. H. Ristine, for appellee.

ELLIOTT, J.—The complaint of the appellee sets forth the following contract :

“January 29th, 1879.

“Memoranda of contract between Solon H. Brown, of the first part, and Elijah C. Brown, of the second part. This is to certify that we, of the first part, did obtain of Elijah C. Brown, of the second part, three thousand dollars, part in a claim against John S. Gray of \$2,640, and the remainder in his own paper, with which we did purchase of the said John S. Gray and others, the following described tract of land in Montgomery county, Indiana, known as the ‘Folse farm,’ and described as follows: The west half of the west half of the southwest quarter of section thirty-five (35), in township nineteen (19) north, range six (6) east; and also the east half of the southeast quarter of section thirty-four (34), in township and range aforesaid, together containing one hundred and twenty acres. The use and control of which we do hereby turn over to the said Elijah C. Brown, of the second part, until sold, and when sold the \$3,000 above named and one-half of the advance over, together with the said \$3,000 that may be obtained on the sale of said land, we will pay to Elijah C. Brown, of the second part; and, also, we, of the first part, do herein agree to put on said lands two hundred dollars (\$200) worth of improvements in clearing, fencing

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and ditching (when deadening gets in suitable condition), and that we, Elijah C. Brown, of the second part, herein agreeing, shall pay the taxes on said lands and keep the farm in as good repair as when received. And in case that the said Elijah C. Brown, of the second part, shall decease before the sale of the farm and the cancelling of this paper, then the three thousand dollars named above shall be and is hereby a gift to the said Solon H. Brown, of the first part, and this paper shall become null and void.

"In testimony whereof we do hereunto subscribe our names respectively the day and year above named.

"(Signed)

SOLON H. BROWN.

"MARY J. BROWN.

"ELIJAH C. BROWN."

It is alleged that Solon H. Brown died testate, in January, 1883, leaving surviving him the appellants as his only heirs; that prior to his death the testator borrowed of the appellee the \$3,000 mentioned in the written contract, for the purpose of purchasing the land therein described. It is also alleged that, on the 29th day of January, 1879, Solon H. Brown, becoming dissatisfied with his purchase of the land, on account of his inability to pay the notes which he had executed to secure the \$3,000 borrowed of the appellee, executed the written contract. It is also averred that the appellee has performed his part of the contract, and that the testator and Mary J. Brown have failed to perform their part, in that they have not expended \$200 in improvements; that the real estate has not been sold. Prayer that the plaintiff be decreed to have an equitable interest in the land; that it be ordered sold, and that the appellee's claim be paid out of the proceeds of the sale.

The case is a peculiar one, but we think the facts stated entitle the appellee to relief. The instrument is badly drawn and was evidently prepared by an unskilful person, but it is not meaningless.

A cardinal rule in the construction of contracts is, that they

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shall be given effect if possible, and the intention of the parties carried into execution. In order to give this contract effect, it must be held that it evidences a debt due to the appellee, payable out of the proceeds of a sale of the land, and to effectuate the intention of the parties, it must be held that a sale of the land shall be made and the debt paid. The terms of the contract, and the circumstances under which it was executed, show that the appellee meant to hold the signers of the instrument liable for the money, and that they assented to this, and also agreed that the money borrowed should be paid out of the proceeds of a sale of the land. It further appears that the money was obtained for the purpose of purchasing the land, and that it was used for that purpose; it is, therefore, equitable that the money which bought and paid for the land should be repaid to the person who furnished it, and this, it is evident, was the intention of the parties. Counsel for the appellant say: "But it was earnestly insisted by counsel for appellee in the court below that the stipulation in the contract, viz., 'The use and control of which' (the land) 'we do hereby turn over to the said Elijah C. Brown of the second part, until sold, and when sold the \$3,000 above named, and one-half of the advance over, together with the \$3,000 that may be obtained on the sale of said land, we will pay to Elijah C. Brown, of the second part,' evinced a clear and unmistakable understanding that the land was to be sold. Standing alone this conclusion would seem reasonable. But, in construing a contract, reference must be had to the entire instrument. The intention of the parties to the contract is the thing to be ascertained. This can not be done by reference to a particular sentence or clause; all the parts must be considered together. Tested by this rule, we think the conclusion erroneous." The argument of appellant's counsel does not meet the proposition of the appellee, for the clause quoted from the contract is consistent with all the other stipulations, and giving to it the construction claimed by the appellee makes the contract a complete and effective one; while any

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other construction would practically nullify it and frustrate the intention of the parties.

It is true that no time is fixed for the payment of the three thousand dollars, but this, surely, does not relieve the debtor from his obligation. If a man promises to pay money borrowed of another, the failure to fix a time for payment does not invalidate the contract, for the law supplies the omitted element, and prescribes that payment shall be made within a reasonable time. So, here, the law entered into the agreement and made it the obligation of the debtor to pay the creditor within a reasonable time.

The instrument is not a lease; it has none of the features of a lease except that of possession, and that is a feature not peculiar to leases. The instrument is a mortgage, for it evidences a debt, contains a promise to pay it out of the land, and puts the land in the possession of the creditor until payment of the debt. It is not the usual mortgage, perhaps not a complete one, but it is sufficient to vest in the creditor a right to have the land, pledged to him and put into his possession, sold to pay the debt; in short, it is an equitable mortgage. 1 Jones Mortg., section 162.

What we have said disposes of all the questions in the case, and renders it unnecessary to discuss the rulings on the answers. Judgment affirmed.

Filed Sept. 18, 1885.

No. 11,061.

IVENS v. THE CINCINNATI, WABASH AND MICHIGAN RAILWAY COMPANY.

PLEADING.—*Specific Statements Control General Averments.*—Specific statements of facts in a pleading control general averments therein.

RAILROAD.—*Negligence.*—*Wilful Injury.*—*Pleading.*—Where the specific facts set out in a paragraph of complaint do not make a case of wilful injury,

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it will be treated as one charging negligence merely, notwithstanding general allegations of wilfulness.

SAME.—*Contributory Negligence.*—*Trespasser.*—*Signals.*—Where a person goes upon a railroad track between stations, at a place where he has no right to be, without looking or listening for approaching trains, and is injured, he can not recover against the company in the absence of wilfulness, notwithstanding a failure to give the signals required by law.

From the Huntington Circuit Court.

J. Brownlee, for appellant.

C. Cowgill, *H. B. Shiveley* and *C. E. Cowgill*, for appellee.

ZOLLARS, J.—Appellant was injured in a collision with one of appellee's trains, and brought this action to recover damages. A demurrer was sustained to the second paragraph of his complaint. That ruling presents the only question for decision here. In the formal part of the paragraph, it is charged that appellee, by its agents and servants, wrongfully, negligently, carelessly, wilfully and purposely, ran one of its trains upon appellant, and wounded and crippled him, without any negligence on his part. Immediately following this is the averment, "which injury was done and caused as follows:" (Here follows a specific statement of all the circumstances under which the injury was received.) The leading facts in this specific statement may be summarized as follows: Appellee had a depot east of and near to the town of Fairmount. The railroad track extends north and south. Appellee's trains were accustomed to stop at the depot to receive and discharge passengers and freight, and to take water. Appellant resided in the town, and had to cross the railroad in reaching a flax-straw mill, where he was at work, about one hundred and fifty yards northeast of the depot. On the morning of the injury, he, with others, crossed the track and went to the mill. After they had reached the mill, they were directed to go to a field situated on the west side of the railroad track, and about five hundred yards north of the depot. In going to the field, they went west to the railroad track, and appellant walked north upon a side-track for about one

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hundred and fifty yards, to a junction of the side-track with the main track. From this point, he walked north on the main track about fifty feet, at which place and time he was struck by the train going north from the depot. When he went upon the track, he did not know that a train had arrived at the depot. No signals of the arrival or departure of the train were given. It is averred that he knew of the duty of the company to give signals, and relied upon the performance of that duty, and that if such signals had been given, he would not have gone upon the track, or would have left it. From the depot to where appellant was injured, the track is straight, with nothing to obstruct the view. It is averred further, that the only convenient, passable, proper and usual way north from the depot, and a public highway, to and beyond where appellant was injured, is upon the railroad track, there being no room or space on either side thereof for persons to pass and repass.

If the case is to be treated as one based upon negligence, it is very clear that the second paragraph of the complaint does not state a cause of action, because it shows that appellant was guilty of contributory negligence. There is a general averment that the injury was inflicted without any fault or negligence on the part of appellant. If the complaint had stopped there, it would have been sufficient as to the want of negligence on the part of appellant, under the rulings of this court. *City of Evansville v. Worthington*, 97 Ind. 282. The pleader, however, proceeded to state the specific facts and circumstances upon which the general averment is based. These specific statements must control the general averment, and they overthrow the general averment that appellant was injured without any fault or negligence on his part.

It appears from the specific averments, that appellee was guilty of negligence in not giving signals, and it also appears from them that appellant, without looking or listening for approaching trains, went upon and walked upon the railroad track between stations, and at a place where he had no right

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to be. He was thus not only guilty of negligence, but he was a trespasser upon the company's property. There may arise cases where a reliance upon the giving of signals may have some bearing upon the question of the party's negligence, but clearly such a reliance will not justify any one in trespassing upon a railroad track, without any kind of precaution for his own safety. It may be, too, that the railroad track was the most convenient way to the field, but neither this fact, nor the fact that appellant and others may have adopted it as a foot-way to the field, would change the relative rights of the parties as to the track. Appellant was clearly guilty of negligence, as shown by the specific statement of facts, and hence can not recover upon the ground simply that appellee was guilty of negligence. The doctrine of comparative negligence, as held by the Illinois court, has never been adopted in this State. *Terre Haute, etc., R. R. Co. v. Graham*, 95 Ind. 286 (48 Am. R. 719), and cases there cited; *Illinois Central R. R. Co. v. Hetherington*, 83 Ill. 510. On the other hand, if the injury was wilfully inflicted, appellant may recover, although he may have been guilty of negligence. *Terre Haute, etc., R. R. Co. v. Graham, supra*, and cases there cited.

Appellant's counsel contends that the paragraph of complaint under discussion makes a case of wilful injury. Appellee's counsel contend that nothing more than negligence is charged. This contention requires a construction of the paragraph. There is a general charge that appellee, by its agents and servants, "wrongfully, negligently, carelessly, wilfully and purposely," inflicted the injury, followed by the statement already set out, "which injury was done and caused as follows." Following the specific facts, as we have already given them, is the following: "Wherefore said plaintiff charges that the said defendant, by its said servants and agents, did then and there, in manner aforesaid, willingly, negligently, wrongfully and purposely, run said locomotive, on and against him, the said plaintiff, as aforesaid."

It is very apparent that the charge of wilfulness is based

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upon the specific facts and wrongs charged. If these do not, as a matter of law, show that the injury was wilfully inflicted, the paragraph does not make a case of wilful injury. We think that it does not. It is not charged that appellee's agents and servants saw appellant upon the track, or knew that he was there. The charge is that the track was straight, with nothing to obstruct the view, and that no signals were given of the arrival of the train at the depot, nor of its departure therefrom. These are the only wrongs charged upon appellee in the specific statement of facts, and they are negative in character. Clearly, these omissions do not, as a matter of law, constitute wilfulness; and as they do not, the second paragraph of the complaint must be treated as one charging negligence only. So treated, it is insufficient, because it shows that appellant was guilty of contributory negligence. The demurrer, therefore, was rightfully sustained thereto.

Judgment affirmed, with costs.

Filed Sept. 15, 1885.

No. 11,991.

THE CINCINNATI, HAMILTON AND INDIANAPOLIS RAILROAD COMPANY v. BUTLER.

NEGLIGENCE.—Railroad Crossing.—Degree of Care.—One who attempts to cross a railroad track must exercise care proportioned to the probable danger.

SAME.—Personal Injury.—Contributory Negligence.—Statutory Signals.—Excessive Speed.—City Ordinance.—One who is injured by a train while crossing the track of a railroad company will not be exonerated from the presumption of contributory negligence, because of the failure of those in charge of the train to give the statutory signals, or because the train was run at a rate of speed prohibited by a city ordinance, if it appears that by the exercise of proper diligence he might have avoided the injury.

SAME.—Negligence per se.—The failure to give signals at a public crossing of the approach of a train is negligence per se, and fixes the liability of

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| 143 | 463 |
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| 103 | 31 |
| 144 | 457 |
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the railroad company to one who, without concurring negligence, is injured thereby.

SAME.—Plaintiff Must Affirmatively Show Injury not to be Result of Contributory Negligence.—Contributory negligence is not a matter of defence in this State, and the plaintiff must show affirmatively, by pleading and proof, that his fault or negligence did not contribute to his injury, before he is entitled to recover therefor.

INSTRUCTIONS.—Bill of Exceptions.—The clerk is authorized to copy into the transcript instructions which are properly identified by, but are not copied into, the bill of exceptions, and the place for the insertion of which is designated by the words "here insert."

From the Franklin Circuit Court.

R. D. Marshall, A. C. Harris, W. H. Calkins and W. C. Forrey, for appellant.

B. F. Claypool, J. H. Claypool, L. W. Florea and G. C. Florea, for appellee.

MITCHELL, C. J.—Daniel W. Butler, a physician, residing in Connersville, Indiana, became involved in a collision which occurred on the afternoon of the 6th day of January, 1883, at the point where Eastern avenue, along which he was driving northward, crosses the Cincinnati, Hamilton and Indianapolis Railroad.

The engine of a regular passenger train going eastward collided with the top buggy in which he was riding. He was thrown violently upon the ground and severely injured. To recover damages for the injuries sustained, this action was brought, resulting in a verdict and judgment for the plaintiff below.

It is insisted that the plaintiff failed entirely to prove that he was free from contributory negligence, and that the appellant's motion for a new trial should have been sustained, on the ground that the verdict was not supported by the evidence.

There was sharp conflict in the testimony, as it appears in the record, at some of the material points. At other points, not seriously disputed, it leaves the plaintiff's right to recover, to say the least, in doubt.

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The plaintiff, and others in his behalf, testified that the train was being run at a rate of speed prohibited by a city ordinance, and that it approached the depot and crossing without giving any warning, either by sounding the whistle or ringing the bell. Against this, the engineer and conductor of the train, and several others, some employees of the company and others not, testified positively that signals were given, both by sounding the whistle and ringing the bell. As the evidence stood upon this point, although negative on the part of the plaintiff, the jury could well have found that the railroad company neglected its statutory duty.

Concerning the manner in which the plaintiff approached the track, and how his vehicle came into the collision, he testified that he drove north along the center of Eastern avenue in a slow trot, until he came to the grade; that then his horse fell into a quick walk; that as he passed the corner of the foundry building he looked up and down the tracks, and neither heard nor saw the approaching train; that a box-car was standing on the south switch, some twenty feet west of the line of the street; that "as I passed the box-car, and after I got past the box-car so that I could see up the track, then I looked up the track and saw an engine in close proximity to me. I looked west; the distance it was would be impossible to tell; it was not very far from me; I do not think it was a hundred feet, perhaps not more than that. My horse was just entering on the main track; whether he was on the main track I could not say, but his head was when I saw the engine. It flashed over me for a moment what to do; my horse's head was on the main track; I just got my whip and gave my horse a lick; he was very quick and went over the track. Just as I did that the engine gave three sharp whistles in quick succession; just as the last whistle sounded the engine struck my buggy; that is all I remember."

Mr. Longfellow, an apparently disinterested and credible witness for the defendant, who saw the occurrence, describes

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it as follows: " I remember the accident on that day " (January 6th, 1883). " I was along the side-track forty or fifty yards from the crossing at Eastern avenue and the railroad ; I was unloading a car of logs. I saw the plaintiff at the time come up Eastern avenue in a buggy. When I first saw him I heard the cars coming and heard them whistle ; he drove right onto the crossing, and when his horse came up onto the switch-tracks the locomotive was very close to him. The horse tried to get off the track ; Mr. Butler pulled on his left line, and did his best, and whipped the horse. He pulled him right in ahead of the locomotive. The locomotive struck the buggy between the front and hind wheels, as near as I could see, and threw it over on the horse ; and that was all I could see, as the cars came between me and the buggy."

It appears from the evidence, that approaching the railroad track going northward a building called the " old foundry " obstructs a view of the track to the westward, until a point from forty to forty-five feet south of the main track is reached. It was claimed, too, that a box-car standing on the switch at the time of the collision presented some further obstruction in that regard.

Assuming that the train was proceeding at a rate of speed prohibited by ordinance, and that contrary to the usual custom it approached the crossing and depot without giving the prescribed signals, and conceding, too, that the situation was such that a view of the approaching train was difficult to be had, it is nevertheless not clear that the plaintiff exercised such care as removes the presumption of contributory negligence.

The degree of caution which the law requires of one about to cross a railroad track, in order to entitle him to recover damages for an injury sustained by coming in collision with a train, has been so often stated by this court that to repeat it would add nothing to its force. That it is difficult, or requires extraordinary effort, at a particular place, to ascertain whether or not it is safe to attempt to cross, does not excuse

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one who is familiar with the locality, and the danger surrounding it, from exercising care proportioned to the probable danger. Manifestly, where obstacles interpose which obstruct sight and sound, it is the plain dictate of ordinary prudence that the traveller on the highway should approach the crossing with a degree of caution much above that which would be required at a point where no obstacles intervened.

While it is imperatively required of those in charge of a train that they give the statutory signals when approaching crossings, and while it may be sufficient to establish negligence against a railroad company to show that a train was run at a rate of speed prohibited by an ordinance, yet, inasmuch as signals given may, under the circumstances supposed, not be heard, or because through neglect or otherwise those in charge of the train may fail to give them, the traveller who sustains an injury by coming in collision with the train will not be exonerated from the presumption of contributory negligence, if it appears that by the exercise of any degree of diligence which was, under the circumstances, reasonably practicable and available, he might have avoided the injury. *Bellefontaine R. W. Co. v. Hunter*, 33 Ind. 335 (5 Am. R. 201); *Toledo, etc., R. W. Co. v. Shuckman*, 50 Ind. 42; *St. Louis, etc., R. W. Co. v. Mathias*, 50 Ind. 65.

The negligence of the railroad company, in failing to observe the obligation imposed on it by statute, will not excuse one who sustains an injury at a crossing, if he neglects the diligent use of all available means of avoiding such injury, nor will its failure in that regard abrogate or modify the rule that no one shall recover damages for an injury not purposely or wantonly inflicted, to which his own negligence contributed.

A traveller should always approach a railway crossing under the apprehension that a train is liable to come at any moment, and while he may presume that those in charge of it will obey the law, by giving the statutory signals, the law will nevertheless require that he obey the instincts of self-preservation,

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and not thrust himself into a situation of danger, which, notwithstanding the failure of the railroad, he might have avoided by the careful use of his senses.

The record in this case does not require us to determine whether the evidence shows that the plaintiff came within the rule required, as it is obvious from an examination of the instructions, that the case was given to the jury upon a theory which the law does not justify.

At this point, it is suggested that the instructions given to the jury are not properly in the record. It is contended that the bill of exceptions copied into the transcript, purporting to set out the charge of the court, did not, in the form in which it was signed by the judge, identify the charge given in such manner as authorized the clerk to copy it into the transcript. The bill, as signed, did not embody the instructions, but referred to them in the manner following: "And be it further remembered that after the charge of the court (to) the jury, which charges are in the following words and figures, to wit (here insert), and to which charges proper exceptions were taken at the time and duly signed by the court." Contrary to the rule which prevailed prior to the enactment of the code, it is now competent to incorporate a paper or document into a bill of exceptions without copying it into the bill. This may be done by so describing or designating it as that the clerk may know to a certainty the particular paper or document intended to be inserted, and by designating by the words (here insert) the place where it is to be copied by the clerk in making the transcript. *Kesler v. Myers*, 41 Ind. 543; *State, ex rel., v. President, etc., P. & J. R. R. Co.*, 44 Ind. 350; *Irwin v. Smith*, 72 Ind. 482.

The paper to be copied into the transcript must be so described or designated as that, when the transcript is read, it can be recognized as the one described. This is to prevent imposition by the clerk, either through mistake or by design. The papers which were to be copied into the bill under consideration were the charges of the court to which exceptions

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were taken, "and duly signed by the court." It must be understood from this that all the charges given were excepted to at the time and signed by the court.

For the purpose of indicating to the clerk the charges which were to be inserted at the place designated, the court recited in the bill that they were such as had been excepted to and signed by the court. Under this designation, no charges except such as were so excepted to and signed could be deemed to be part of the charge of the court, and thus the authority of the clerk was limited to the insertion of the papers so described.

As charges answering this description are contained in the record, and as it will be presumed that the clerk was acquainted with the signature of the judge, and that instructions so described could be as readily identified as if they had been designated by letters or figures, it is deemed that this was a sufficient identification so far as relates to those so signed and excepted to.

One of the instructions excepted to told the jury, in substance, that if the railroad company failed to comply with the statute, which requires that upon the approach of a public highway crossing by a train, the whistle shall be sounded and the bell rung in a prescribed manner, "and an accident and injury occurred therefrom, this would be negligence on the part of the railroad company."

The contention of counsel is, that the omission to give the statutory signals was nothing more than evidence of negligence, and not negligence *per se*, and that "proof of the violation of the statute is not sufficient to determine the company's liability."

While it may be conceded that proof of the violation of the statute is not sufficient to determine the liability of the company, it is nevertheless sufficient to determine the company's negligence. The duty to give certain prescribed signals upon approaching a public highway was a duty defined by a positive law of the State, and a failure to observe it was

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in and of itself negligence, which involved the company in liability to any one who, without concurring negligence, was injured thereby. *Cincinnati, etc., R. W. Co. v. Hiltzhauer*, 99 Ind. 486; *Central R. R., etc., Co. v. Letcher*, 69 Ala. 106 (44 Am. R. 505); *Cordell v. New York Central, etc., R. R. Co.*, 64 N. Y. 535; *Pittsburgh, etc., R. W. Co. v. Martin*, 82 Ind. 476; 2 Thomp. Neg., section 1232.

The third instruction given by the court at the request of the plaintiff is also a subject of discussion.

This instruction sets out at too great length to admit of copying in full the several supposed hypotheses upon which the plaintiff rests his right of recovery, and assuming that the facts thus stated were found proved by the evidence, it concludes thus: "Then it will be your duty to find for the plaintiff, unless you find from a fair preponderance of the evidence that the plaintiff was heedless or careless, and neglected to avail himself of the usual precaution which a man of ordinary prudence would use under like circumstances before he drove on defendant's track."

The instruction proceeds upon the theory that the presumption of law is that the injury occurred without the fault of the plaintiff, and that the burden was on the railroad company to show by a fair preponderance of the evidence that he was "heedless or careless." The idea conveyed by it is, that certain facts, inculcating the defendant, being proved to the satisfaction of the jury, they should find for the plaintiff, unless it was proved by a fair preponderance of the evidence that the injury resulted from his own carelessness, thus, in effect, directing them to find for the plaintiff in the event they were unable to determine from the evidence whether the plaintiff had, or had not, been guilty of concurring negligence. The rule required that the plaintiff should make it affirmatively appear to the jury, that his injury was the result of the defendant's negligence, and that he was not guilty of any contributory negligence. If the plaintiff's negligence contributed to the accident, then it was not, in contemplation

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of law, caused by the defendant's negligence, and for that reason he must, as a condition to his right of recovery, make it appear affirmatively, that he was without fault contributing to the injury.

The jury were authorized to infer from the instruction given, that upon establishing the defendant's negligence, and his injury, the plaintiff had a right to their verdict, and that that right continued until it was shown by a fair preponderance of the evidence that the injury was the result of his own carelessness. This was an exact reversal of the rule. The plaintiff must make it appear that he was free from fault, before the defendant can be called upon to answer the negligence imputed to it. Cooley Torts, 673.

It is true, as counsel contend, that the rule prevails in some of the States that contributory negligence is matter of defence; it is not so in this State. *Cincinnati, etc., R. W. Co. v. Hiltzhauer, supra*; *Toledo, etc., R. W. Co. v. Brannagan*, 75 Ind. 490.

In the case of *Hathaway v. Toledo, etc., R. W. Co.*, 46 Ind. 25, the following instruction was held to be a correct statement of the law: "When a person crossing a railroad track is injured by collision with a train, the fault is, *prima facie*, his own, and he must show affirmatively, that his fault or negligence did not contribute to the injury, before he is entitled to recover for such injury."

This rule is founded upon the same reason as that which raises a presumption of negligence against a railroad company in favor of a passenger who sustains an injury by reason of a train being thrown from the track. Where a passenger is passively seated in a car, which is thrown from the track, by which he sustains injury, proof of the fact that he was a passenger, that the accident occurred, and that he was injured, is *prima facie*, at least, all that he can say about it. This is not the case with one who is injured at a highway crossing. In such an occurrence, he is one of the independent actors, charged with duties correlative with the duties of the rail-

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road company. He is able and he must show whether his duty was performed.

Thousands of persons pass safely over a given crossing over which thousands of trains are run, under every variety of circumstances, before one is injured, and, therefore, it may be said a presumption arises that the crossing may be safely passed by all those who observe such care as prudent persons ordinarily observe. Out of the thousands who crossed, the one who sustained injury is the exception. Because the thousands who crossed in safety are supposed to represent the ordinary course of conduct better than the one, a presumption of fact is indulged that he, too, would have passed in safety had he observed the caution which prudent men ordinarily observe under like circumstances. This presumption is at least sufficient to require from him an explanation of his relation to the occurrence, and an affirmative showing that the circumstances were such, and his conduct such, that he was not in fault, and as his own conduct and his relation to the occurrence are peculiarly known to himself, and may be unknown to the railroad company, the requirement is a reasonable one.

That the relation of the facts of the injury, and the circumstances under which it occurred, may rebut all presumption of negligence, may be conceded, but this does not affect the rule that the plaintiff has the burden of proof, nor impose upon the defendant the necessity of proving by a preponderance of the evidence that the plaintiff was negligent.

In cases where contributory negligence may be claimed, it is settled in this court that the absence of contributory negligence is part of the plaintiff's case, both as to averment and proof.

It is contended by learned counsel for appellee, that even if the foregoing instruction was erroneous, it resulted in no harm, for the reason that other instructions, given at the defendant's request, stated the rule as claimed by the appellant.

Without determining the question thus suggested, it is suf-

The City of Madison v. Baker.

ficient to say that none of the instructions requested by the defendant are excepted to and signed by the court, and so within the rule already indicated they are not properly in the record.

This suggestion disposes of the argument of counsel for the appellant on the subject of the refusal of the court to give instructions asked by them; they are not in the record.

This disposes of all the questions discussed which are likely to arise on a second trial, and for the reasons stated the judgment is reversed, with costs.

Filed Sept. 16, 1885.

No. 12,050.

THE CITY OF MADISON v. BAKER.

CITY.—Defective Street.—Complaint for Injury.—Negligence.—Notice.—Supreme Court.—Practice.—In an action against a city for negligently permitting a street to be out of repair, whereby the plaintiff was injured, the complaint, when questioned for the first time in the Supreme Court, will be held good as to the matter of notice, when its averments plainly imply that the city had notice of the bad condition of the street when the plaintiff was injured; and after verdict it will be inferred that the notice was in time to have enabled the city to repair the street.

SAME.—Contributory Negligence.—For averments held sufficient to rebut the presumption of contributory negligence, see opinion.

SAME.—Proof of Notice.—Notice to the corporation of the defect which caused the injury, or facts from which notice may reasonably be inferred, or proof of circumstances from which it appears that the defect ought to have been known and remedied by it, is essential to liability.

From the Jefferson Circuit Court.

E. G. Hay and *P. E. Bear*, for appellant.

J. P. Wells, for appellee.

NIBLACK, J.—Suit by John R. Baker against the city of Madison, for negligently permitting one of its streets to be out of repair, whereby the plaintiff was injured. Trial by a jury. Verdict and judgment for the plaintiff.

The City of Madison v. Baker.

Error is first assigned upon the alleged insufficiency of the complaint to support the judgment.

The complaint averred that Ryker's Ridge Turnpike Road connected with one of the streets of the city of Madison, and that said street, in connection with said turnpike road, formed a continuous highway through said city; that on the 26th day of October, 1883, and for some time before, said highway was badly out of repair, and was dangerous to travel upon in a wagon at night; that said city had allowed a large ditch to be washed out on one side of said highway, about three feet wide, and of about the same depth, and to remain without any fence or other barrier to restrain travellers from danger, or any sign to show them where the dangerous part of said highway was; that there was no gas or other light within a hundred and fifty yards of said ditch; that in the early part of the night of the said 26th day of October, 1883, the plaintiff was travelling on said highway with his wagon and team, consisting of two horses, having his son and minor daughter with him in the wagon, to the said city of Madison to market; that said highway being in such bad condition and carelessly and negligently out of repair, and the said city knowing the same to be out of repair, and the plaintiff having no knowledge of said ditch, and believing said highway to be in good repair, and while driving his wagon and team with care along the same, and without any fault or negligence on his part, the wagon, while in the corporate limits of the city, went into and upset in said ditch, thereby greatly injuring the plaintiff and his said daughter.

Two objections are urged to the sufficiency of the complaint: First. That it is not sufficiently made to appear that the city had proper notice of the bad condition of the street. Second. That the facts averred are not sufficient to rebut the presumption of contributory negligence. The sufficiency of the complaint was not challenged in the court below. Hence, in legal effect, the only question upon the complaint now is, Is it sufficient to sustain the judgment after a verdict has

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been rendered upon it? The indirect and inferential averments, that the highway, within the corporate limits of the city and where the wagon ran into the ditch, was carelessly and negligently permitted to be out of repair, and that the city had knowledge that it was so out of repair, fairly and plainly imply that the city had notice of the bad condition of the street when the plaintiff and his daughter were injured, and after verdict we will infer that the notice was in time to have enabled the city to repair the street, if it had desired to do so. *Corporation of Bluffton v. Mathews*, 92 Ind. 213; *Turner v. City of Indianapolis*, 96 Ind. 51. As to the remaining objection to the complaint, we think the averments are sufficient to rebut any inference of contributory negligence, even upon demurrer. *Wilson v. Trafalgar, etc., Gravel Road Co.*, 83 Ind. 326.

Error is next assigned upon the refusal of the circuit court to grant a new trial, and, in support of that assignment of error, it is argued that the evidence was not sufficient to sustain the verdict.

The evidence established the fact that a ditch had been constructed for drainage at the side of the highway where the plaintiff's wagon ran off and turned over, and there was evidence tending to show that the ditch was at the time probably both wider and deeper than was necessary for drainage merely, but there was nothing even purporting to prove when or how the ditch became enlarged, if indeed it had become so. Neither was there any evidence proving or tending to prove that the city had notice of the alleged bad condition of the street, or that it was in any manner out of repair. In the concluding part of section 1024, Dillon Municipal Corporations, it is said that, "Where the duty to keep its streets in safe condition rests upon the corporation, it is liable for injuries caused by its *neglect or omission* to keep the streets in repair, as well as for those caused by defects occasioned by the *wrongful acts of others*, but, as in such case, the *basis of the action is negligence*, notice to the corporation of the

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defect which caused the injury, or facts from which notice thereof may reasonably be inferred, or proof of circumstances from which it appears that the defect ought to have been known and remedied by it, is essential to liability." On the same subject, see also sections 1025 and 1026, as well as *Turner v. City of Indianapolis, supra*, and 4 Wait Actions and Defences, 639. Notice of a defect in a street may sometimes be inferred from lapse of time, but in this case it was not made to appear that the defect complained of had existed for even a day before the plaintiff ran into the ditch. As regards the city's alleged knowledge that the street in question was out of repair, there was, consequently, a total failure of proof. The case is in other respect not a satisfactory one upon the evidence, but as the cause will probably be again tried, we forbear further comment at the present hearing.

The judgment is reversed with costs, and the cause remanded for further proceedings.

Filed Sept. 18, 1885.

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No. 12,354.

STEWART, ADMINISTRATOR, v. THE TERRE HAUTE AND INDIANAPOLIS RAILROAD COMPANY.

STATUTORY DAMAGES FOR DEATH.—*Action by Personal Representative.*—

Complaint.—A complaint by an administrator against a railroad company, to recover damages for the death of his intestate, must, to show a cause of action, allege that the latter left surviving him either a widow or children, or next of kin.

SAME.—Arrest of Judgment.—In the absence from the complaint of such allegation, the judgment will be arrested on motion.

SAME.—Practice.—A motion in arrest of judgment, because of a fatally defective complaint, may be properly sustained, notwithstanding the fact that a demurrer to such complaint had been previously overruled.

From the Clay Circuit Court.

Stewart, Administrator, v. The Terre Haute and Indianapolis R. R. Co.

E. S. Holliday and *G. A. Byrd*, for appellant.

J. G. Williams, *G. A. Knight* and *C. H. Knight*, for appellee.

Howk, J.—In this case, the appellant, William Stewart, administrator of the estate of William O. Stewart, deceased, sued the appellee, the Terre Haute and Indianapolis Railroad Company, in a complaint of three paragraphs. The object of the action, as stated in each of such paragraphs, was to recover damages for the death of appellant's intestate, caused, as alleged, by the wrongful act or omission of the appellee, without fault or negligence on the part of the decedent or of the appellant. The cause was put at issue and tried by a jury, and a verdict was returned for the appellant, the plaintiff below. Thereupon, the appellee moved the court to arrest judgment on the verdict, which motion was sustained by the court, and judgment was arrested accordingly.

The sustaining of appellee's motion in arrest of judgment is the only error assigned here by the appellant. This motion was in writing, and stated the following grounds for the arrest of judgment, namely:

"1. Because the complaint herein does not state facts sufficient to constitute a cause of action.

"2. Because the complaint does not show facts sufficient to entitle the plaintiff, as administrator, to maintain this action.

"3. Because the complaint does not contain any averments that plaintiff's intestate left surviving him a widow and children, or either of them, or any next of kin.

"4. Because the complaint does not contain any averments that plaintiff's intestate left surviving him a widow or children, or next of kin, nor was it proven on the trial that said intestate left surviving him a widow or children, or next of kin."

Appellant's cause of action for the death of his intestate, as stated in his complaint, was unknown to the common law, and is of statutory origin. *Cincinnati, etc., R. R. Co. v.*

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Chester, 57 Ind. 297. In section 284, R. S. 1881, it is provided as follows: "When the death of one is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action therefor against the latter, if the former might have maintained an action, had he lived, against the latter for an injury for the same act or omission. The action must be commenced within two years. The damages can not exceed ten thousand dollars, and must inure to the exclusive benefit of the widow and children, if any, or next of kin, to be distributed in the same manner as personal property of the deceased."

This section is substantially a re-enactment of section 784 of the civil code of 1852 (2 R. S. 1876, p. 309), the only material difference between the two sections being that, under the older one, the damages could not exceed \$5,000. Under the statute, the action is prosecuted by and in the name of the personal representative of the decedent, for the benefit not of the plaintiff as such nor of the decedent's estate, but for the exclusive benefit of the widow and children, if any, or the next of kin, of the decedent. If, therefore, the decedent leave neither wife nor child surviving him, and have no next of kin at the time of his death, it is very clear, we think, that his personal representatives could not maintain an action for the recovery of the damages, given by the statute, against the party whose wrongful act or omission caused his death. In *Indianapolis, etc., R. R. Co. v. Keeley*, 23 Ind. 133, in construing the statutory provisions now under consideration, the court said: "As the right to sue is purely a statutory one, and in derogation of the common law, the statute must be strictly construed, and the case brought clearly within its provisions, to enable the plaintiff to recover. The right to sue is given to the personal representative of the deceased, and the action is prosecuted in his name; but the damages 'must inure to the exclusive benefit of the widow and children, or next of kin,' and therefore the action is, in effect, prosecuted for their benefit. If there

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were no wife, children, or next of kin, surviving the deceased, capable of taking under the statute, the action would not lie. It is therefore clear that the complaint must at least aver that there are such persons to whom, under the statute, the damages inure. It is an issuable fact that may be controverted, and must be alleged in the complaint; and, if denied, must be proved to sustain the action." To the same effect, substantially, are the cases of *Jeffersonville R. R. Co. v. Swayne*, 26 Ind. 477, and *Jeffersonville, etc., R. R. Co. v. Hendricks*, 41 Ind. 48.

In the case at bar, the objections urged by the appellee, in its motion in arrest of judgment, to the sufficiency of appellant's complaint, are well taken as to each paragraph thereof. It is nowhere averred in the complaint, or in any of its paragraphs, that appellant's intestate left surviving him, at the time of his death, a wife or child, or any next of kin, or any person to whom, under the statute, the damages would inure. Such an averment of fact or facts was and is essential to the appellant's right of recovery in this action, and there is nothing in his complaint, or in any of its paragraphs, from which such fact or facts, by the most liberal intendment, may be inferred. In such case, it is well settled by the decisions of this court, that, upon a proper motion therefor, the judgment must be arrested. *Heddens v. Younglove*, 46 Ind. 212; *Newman v. Perrill*, 73 Ind. 153; *Eberhart v. Reister*, 96 Ind. 478.

The point is made by appellant's counsel that the motion in arrest ought to have been overruled by the court, because it had previously overruled appellee's demurrer to his complaint. This point is not well taken. In *Newman v. Perrill*, *supra*, the appellant contended that, because the circuit court had overruled demurrers to his complaint, it could not afterwards rightfully sustain a motion in arrest. In answering this contention, this court there said: "We do not think that the court, by ruling wrongly on the demurrers, precluded itself from afterwards ruling rightly upon the motion in ar-

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rest. * * * A complaint fatally defective is vulnerable to attack, even upon appeal, and there can certainly be no error in declaring a fatally defective complaint bad on motion in arrest, although demurrers may have been previously overruled. It is the duty of the court not to permit a judgment to be entered upon a complaint which is so clearly insufficient as to afford the judgment no foundation."

Some other objections are urged by the appellant's counsel to the action of the court in arresting judgment on the verdict, but these we need not and do not consider. For reasons already given, the appellant's complaint was radically and fatally defective, and we are bound to assume, in the state of the record before us, that the defects in the complaint were not supplied by the evidence, nor cured by the verdict, if such a thing were possible. If the decisions of this court in *Indianapolis, etc., R. R. Co. v. Keeley*, *supra*, and the cases which follow it, state the law correctly, as we think they do, and if we adhere to those decisions, as we think we must, it is certain that the court did not err, in the case in hand, in sustaining appellant's motion and arresting judgment on the verdict.

The judgment is affirmed, with costs.

Filed Sept. 16, 1885.

No. 11,381.

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PRACTICE.—*Motion to Dismiss Appeal from County Commissioners.*—*Bill of Exceptions.*—A motion in the circuit court to dismiss an appeal from the board of county commissioners must be made part of the record by bill of exceptions or order of court.

HIGHWAY.—*Petition to Enter of Record.*—*Notice.*—*Practice.*—*County Commissioners.*—A question as to notice of the pendency of a petition to have a highway described, and entered of record, must be made at the first opportunity before the board of commissioners.

SAME.—*Appearance.*—*Waiver of Defect in Notice.*—An appearance before the

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board of commissioners, without objecting to the notice, is a waiver of any defect therein, and objection can not afterwards be made on appeal.

SAME.—Petition.—Jurisdictional Fact.—The highway law does not require that the qualifications of the petitioners for the recording of a highway shall appear upon the face of the petition. Whether or not it is signed by qualified persons, is a question for the decision of the county board before taking further action upon it.

SAME.—Objection to Qualification of Petitioners.—Waiver.—Objections to the qualifications of the petitioners should be made at the first opportunity before the county board, and if not so made they will be deemed as waived.

SAME.—Appearance to Defective Petition.—Practice.—The judgment will not be reversed because the petition does not give the names of the persons over whose land the highway passes, when it appears that all such persons, without objecting, voluntarily appeared to such petition.

SAME.—Evidence.—The petition is a paper in the case, and need not be introduced in evidence.

SAME.—Order Entering of Record.—In ordering the highway entered of record, the county board and the circuit court, on appeal, are confined to the road as described in the petition.

SAME.—Immaterial Variance.—An immaterial variance between the petition and the evidence, as to the beginning of the highway, will not overthrow the proceeding.

SAME.—Estoppel.—The refusal of the county commissioners to order a highway opened and established upon the line of an existing highway does not estop the board or others from having the existing highway entered of record.

SAME.—User.—Public Utility.—When a way has become a public highway by user, it is such regardless of any question of public utility.

From the Laporte Circuit Court.

M. Nye and D. Turpie, for appellants.

L. A. Cole, for appellees.

ZOLLARS, J.—Appellee instituted this proceeding before the board of county commissioners, under section 5035, R. S. 1881, to have an alleged highway ascertained, described and entered of record, on the ground that it had been used as such for twenty years. From a decision of the board against them, they appealed to the circuit court. In that court the appellants here moved to dismiss the appeal. The overruling of

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that motion is assigned as error. The clerk below has inserted in the transcript what purports to be a copy of the motion, but it was not made a part of the record by order of the court, nor is it contained in any bill of exceptions. We can not disregard the contention of appellees, that the motion is not a part of the record, and hence is not before us for any purpose. *Crumley v. Hickman*, 92 Ind. 388, and cases there cited. Without the motion, we have no way of knowing upon what it was based, and hence have nothing upon which to base a decision that the ruling upon it was right or wrong. The assignment predicated upon that ruling, therefore, presents no question for decision here.

The second assigned error is, that the court below erred in overruling appellants' motion to dismiss the petition and the proceedings under it. Under this assignment, the argument is that the petition, and all proceedings under it, should be dismissed, because of defects in the petition, and because there was no notice given of the pendency of the petition and proceeding.

Upon the question of notice, it is sufficient to say that the record before us requires no decision as to its necessity. We, therefore, leave that question where it is left by former decisions. Appellants, who seem to own all of the land over which the alleged highway passes, appeared in the commissioners' court, and, without making any question as to notice, made a full appearance by filing what is denominated an answer. At the first term of the circuit court after the appeal, the parties all appeared by counsel, and the cause was continued without any question as to notice. At a subsequent term, appellants moved to dismiss the appeal, and also to dismiss the proceedings. The clerk below has inserted in the transcript copies of these motions. As they were not made a part of the record by order of the court, and are not contained in any bill of exceptions, they are not properly in the record, so far, at least, as they relate to, or are based upon, the want of notice. There are, therefore, two conclusive rea-

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sons why this court can not, upon the question of notice, overthrow or interfere with the final judgment below.

In the first place, the motions to dismiss not being properly before us, there is nothing upon which to predicate a decision that notice was not given or that appellants at any time made any question as to notice.

In the second place, appellants should have made the question as to the notice at their first opportunity before the board of commissioners. Having appeared and having made no objections there, as to notice, they waived whatever objections might have been made. Having thus waived the objections, they were not in a condition to make them upon appeal. This is the rule in other highway and analogous cases, and the reasonable rule to be applied here. We cite some of the cases: *Milhollin v. Thomas*, 7 Ind. 165; *Smith v. Alexander*, 24 Ind. 454; *Fisher v. Hobbs*, 42 Ind. 276; *Green v. Elliott*, 86 Ind. 53, and cases there cited; *Vandever v. Garshwiler*, 63 Ind. 185; *Peed v. Brenneman*, 89 Ind. 252; *Lowe v. Ryan*, 94 Ind. 450; *Bradley v. City of Frankfort*, 99 Ind. 417.

Under the assignment, based upon the motion to dismiss the proceedings, and the fourth assigned error, that the petition does not contain a sufficient statement of facts to constitute a cause of action against appellants, it is argued that the petition is defective, because it does not contain the names of the persons over whose land the alleged highway passes, and because it does not purport to be signed by any freeholder or citizen of Laporte county.

Assuming that the petition should be signed by freeholders, as in an ordinary highway case, appellants' counsel argue that it is insufficient because it does not purport to be so signed. But if the correctness of the assumption should be granted, about which we decide nothing in this case, counsel's conclusion would not follow. The general highway law provides that the petition shall be signed by freeholders, but it does not require that this shall appear upon the face of the petition. The petition need not, in any case, "purport to be

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signed by freeholders." *Brown v. McCord*, 20 Ind. 270. Whether or not the petition is so signed, is a question for the decision of the county board before taking further action upon it. Objections to the qualifications of the petitioners should be made at the first opportunity before the county board. If not made then and there, they will be deemed as waived. *Little v. Thompson*, 24 Ind. 146; *Fisher v. Hobbs*, 42 Ind. 276; *Wilson v. Whitsel*, 24 Ind. 306; *Sowle v. Cosner*, 56 Ind. 276; *Turley v. Oldham*, 68 Ind. 114.

It is further contended under these assignments of error, that the petition is fatally defective because it does not give the names of the persons over whose land the highway passes. This contention is based, in the main, upon the case of *Vandever v. Garshwiler*, *supra*. It was said in this case, that when the moving parties are other than the county board, the petition should give the names of the owners of the land over which the road is claimed to run, so that the court can cause proper notice to be given to them of the pendency of the petition. In the case before us, however, the reason has no application. Here, it appears by appellants' motion to dismiss, and otherwise, that they were the owners of all the land over which the highway passes, and that without any objections in the commissioners' court, they made a voluntary appearance to the petition and proceeding. So far, therefore, as concerns notice to land-owners, no beneficial end could have been accomplished by inserting their names in the petition. Nor would the ends of justice be subserved by reversing the judgment on account of this alleged defect in the petition. Without deciding more, as to the requisites of the petition in this regard, it is sufficient to say that upon the record before us the judgment should not be reversed on account of the alleged defect in the petition.

It is contended that the motion for a new trial should have been sustained, first, because the petition was not introduced in evidence; second, because there was no proof that the petitioners were freeholders; and, third, because the proof

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as to the line and location of the highway did not agree with the description as given in the petition. The petition was a paper in the case, as the complaint in an ordinary case, and there was no necessity of introducing it in evidence. *Daggy v. Coats*, 19 Ind. 259. Not having made the question before the county board, there was no question before the court on appeal as to the qualification of the petitioners. In ordering the highway entered of record, the county board and the circuit court were confined, of course, to the highway as described in the petition.

The verdict and final order have reference to this highway. Unless the proof showed that this had become a public highway by twenty years' use, the case failed, and a new trial should have been granted. The petition describes the beginning of the highway, as commencing at the north end of the road running through Wilson's second addition of outlots to the city of Laporte, being $275\frac{75}{100}$ feet east of the southwest corner of west fractional part of section thirty-four, etc. The evidence shows that the highway does begin at the north end of the road, running through Wilson's said addition, but that this road, at that point, is $285\frac{1}{10}$ feet east of the said corner, as measured by the witness. The north end of the road through Wilson's addition seems to be well known, and is the visible monument by which the beginning of the alleged highway should be determined, rather than the measurement from the corner of the section of land.

It is easy to be mistaken in the measurement, but it is not likely that there would be any mistake about the Wilson road. The petition and the evidence agree that there was a highway commencing at the north end of the Wilson road; they only disagree as to the distance of the north end of that road from the named corner of land. This is not such a variance as ought to overthrow the proceeding. *Gray v. Stiver*, 24 Ind. 174; *Simonton v. Thompson*, 55 Ind. 87; *Hedge v. Sims*, 29 Ind. 574.

In the circuit court, appellants filed what purports to be,

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and what they style, an answer in bar of the proceeding, in substance, that at a previous term of the county board appellees had petitioned for the location and opening of a highway, upon the line of the highway that they here seek to have entered of record, and that upon that petition, and a report of viewers, the board adjudged that the proposed highway would not be of public utility, and should not be opened, and that the judgment remained in full force.

If this answer is sufficient to bar this proceeding, it was error to sustain the demurrer to it. If it does not constitute such a bar, it was not error to sustain the demurrer to it, whatever weight the facts set up might be entitled to for any purpose other than as a bar to the proceeding.

That the county board may have refused to open a new highway upon the line of that here sought to have entered of record as an existing highway, surely can not bar this proceeding; the proceedings are entirely dissimilar. One goes upon the theory that there is no highway, and that one should be opened; the other goes upon the theory that there is an existing highway, and that no action by the county board, nor any other authority, is necessary to establish it. In the latter proceeding, the county board is not asked to locate and open a new highway, but simply to ascertain, describe and enter of record one already existing and open for travel. The board might well refuse to order a highway to be established and opened upon the line of an existing highway, without debarring itself or others of the right to have the existing highway entered of record. Refusing to order a highway located upon the line of an existing highway will not vacate the existing highway.

It is contended in argument, that appellees might have joined in their petition for the location and opening of the highway an application such as that made in this case, and that as they did not do so they are estopped to institute and maintain this proceeding. It would seem to be an inconsistent proceeding to join in the same petition an application

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to have a highway entered of record as an existing highway, and also an application to have a new highway opened upon the same line. The contention can not be maintained.

One question remains. It is contended that the question of public utility is a material question here, and that that question was adjudicated in the former proceeding. When a highway has been established and opened by the county board, there is no longer involved any question of public utility; so, when a way has become a public highway by user, it is such regardless of any question of public utility, and it will remain such until it shall be vacated in a proper proceeding or by non-user, and that, too, whether entered of record or not. The order for entering of record is not the establishment of a highway, but an adjudication of the fact that there is already such a highway. If, indeed, there is no such a highway, the order may have the effect of establishing one; but this is not the purpose or theory of the order or proceeding. It must follow that the question of public utility in a proceeding like this can not in any way constitute a bar to the proceeding. There was no error, therefore, in sustaining the demurrer to the answer.

As we find no available error in the record, the judgment is affirmed, with costs.

Filed Sept. 17, 1885.

No. 10,949.

THE STATE, EX REL. SCOBEY, *v.* STEVENS ET AL.

OFFICE AND OFFICER.—County Clerk.—Action on Bond to Recover Illegal Fees.—Constitutional Law.—Twice in Jeopardy.—That part of section 6031, R. S. 1881, which provides that "Any officer who shall charge, demand, or take" any unauthorized fee for the performance of any official act, shall, in addition to being deemed guilty of a misdemeanor, "be liable on his official bond to the party injured for five times the illegal fees charged, demanded, or taken," is not unconstitutional, as being within the prohi-

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bition of that part of the Bill of Rights which declares that "No person shall be put in jeopardy twice for the same offence."

SAME.—Criminal and Civil Liability for Same Act.—Exemplary Damages.—Legislative Power.—The Legislature has the power to prescribe fines and penalties against certain acts, and at the same time fix or limit the civil liability for the same acts, but not to authorize the recovery of unrestricted exemplary damages. ELLIOTT, J., dissents.

SAME.—Liability on Bond for Failure to Discharge Duty Required by Subsequent Law.—Under section 5528, R. S. 1881, a permanent, continuing liability is created against an officer and his sureties for the failure to discharge any duty imposed by existing law, and for the failure to discharge any duty required under laws subsequently enacted.

SAME.—Motion to Re-Tax Costs.—Collateral Attack.—The failure of a party to move to re-tax costs can not relieve an officer from his statutory liability if he has in fact charged illegal fees, nor is an action on his bond for such fees a collateral attack on the judgment for costs, of which such officer can take advantage.

SAME.—Statute of Limitations.—Under the second clause of section 293, R. S. 1881, an action on the bond of a county clerk to recover fees charged illegally may be brought within five years from the time the cause of action accrued.

From the Decatur Circuit Court.

J. S. Scobey, for appellant.

J. D. Miller and *F. E. Gavin*, for appellees.

MITCHELL, C. J.—The relator brought this suit on the official bond of Stevens, who was formerly clerk of the Decatur Circuit Court. The action was based on section 6031, R. S. 1881. This section enacts that "Any officer who shall charge, demand, or take any fee for any official act done or performed under the provisions of this act, other than as is herein allowed and provided for, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be fined in any sum not exceeding one hundred dollars, and shall be liable on his official bond to the party injured for five times the illegal fees charged, demanded, or taken, and the same may be recovered, with costs, in the circuit court."

It is charged that the defendant Stevens, having been elected and qualified as clerk, took upon himself the duties of that office on the 1st day of November, 1875, and con-

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tinued therein until the expiration of his term; that, on the 6th day of February, 1877, a civil suit was commenced against the relator in the Decatur Circuit Court, which continued pending until the 31st day of July, 1879, when it was dismissed at his costs; that upon the dismissal of the suit, Stevens made up and taxed the costs for his services as clerk on the fee books of the court, and that of the costs so taxed there was included, in various specified items, the sum of \$20 in excess of his legal charges, which, on the 29th day of May, 1882, he demanded of the relator, and for which he issued a fee bill, on the 5th day of June, 1882. The relator prays judgment for \$100, being five times the amount of the fees alleged to have been illegally charged and demanded.

The court below sustained a general demurrer to the complaint, and the case comes here on this ruling.

It is argued by the learned counsel for the appellee, that so much of the statute as authorizes the recovery of five times the illegal fees charged, in a suit by the injured party on the official bond of the officer, is unconstitutional, as being within the prohibition of that part of the Bill of Rights which declares that "No person shall be put in jeopardy twice for the same offence." The extent of the argument on this point is the statement of the proposition by counsel for the appellee, and the citation in its support of *Koerner v. Oberly*, 56 Ind. 284 (26 Am. R. 34). In the appellant's brief we find no allusion to the question. This leads us to conclude that the ruling below must have turned upon some other point. As the question is presented for decision, it would have been a source of satisfaction to the court if the learned counsel on both sides had favored us with such argument of it as their learning and ability led us to expect. Whatever may be said of the case above cited, we do not think it controls the decision of the one before us. That was a suit brought by a wife to recover damages for an unlawful sale of intoxicating liquor to her husband, who was in the habit of becoming in-

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toxicated. Section 12 of the act of 1873, Acts 873, p. 151, gave a right of action against any person so offending in favor of any person who should be injured thereby in person, property or means of support. It authorized a recovery by any person so injured of all damages which might be sustained, "and for exemplary damages." The same act made it a misdemeanor for any person to sell intoxicating liquor to a person in the habit of becoming intoxicated, and provided a penalty to be enforced by indictment or otherwise. It was held in the case relied on, that in so far as section 12 attempted to authorize the recovery of exemplary damages by the injured person, it was in conflict with the provision in the Bill of Rights above quoted, and therefore inoperative and void.

It has been the settled rule of decision in this State since the case of *Taber v. Hutson*, 5 Ind. 322, that in all that class of torts, for which, in addition to the civil remedy allowed to the injured party, the wrong-doer was amenable to criminal punishment, exemplary or punitive damages could not be recovered in a civil action; while, in the class not rising to the degree of criminality, the injured party might, where the elements of fraud, malice, gross negligence or oppression mingled in the controversy, in addition to full compensation for all other damages, recover what is termed exemplary or punitive damages. *Lytton v. Baird*, 95 Ind. 349; *Stewart v. Maddox*, 63 Ind. 51, and cases cited.

As defined, compensatory damages are held to include not only such pecuniary loss or injury in a given case as is capable of approximately accurate calculation, but in addition thereto such a sum as may be supposed adequate to compensate "for injury to business or profession, reputation or social position, and for physical suffering, as bodily pain, permanent disfiguration," etc., "and for mental trouble, as anguish of mind, sense of shame or humiliation, loss of honor," etc., "all of which are considered compensatory, and not exemplary or punitive damages."

Exemplary or punitive damages, the terms exemplary and punitive being synonymous, are damages allowed as a punishment, or by way of example, to deter others from the like offences, for torts committed with accompanying fraud, malice or oppression.

The rule of decision defining the class of cases in which exemplary damages would, and that in which such damages would not, be allowed, rests wholly on judicial construction, and, except in the cases of *Koerner v. Oberly*, *supra*, and *Schafer v. Smith*, 63 Ind. 226, which involved the same statute, and followed the first named case, none of the cases in which the rule is declared and applied involve any question of legislative power.

Previous to the decision in the *Koerner* case, the court seemed to regard the constitutional provision referred to as an obstacle against its power to allow, or at least against the policy of allowing, exemplary damages in the class of cases where the defendant was also subject to criminal punishment. While the question of *power* was not in any case, so far as we know, directly determined, the prevailing rule was adopted by the court as being in consonance with the spirit of both the constitutional provision and the ancient common law maxim, and as a safe middle ground in a controversy with which courts and lawyers are familiar.

In *Koerner v. Oberly*, *supra*, it was distinctly ruled that the Legislature was prohibited by the Constitution from authorizing the infliction of exemplary damages for a wrong which was also punishable as a crime.

Whatever may be thought of the rule, so far as it rests on judicial construction, in the opinion of the writer, it is not the part of it which denies the infliction of punitive damages in some cases that is open to criticism, so much as that which permits it in any civil case. The assumption that the penal code should be supplemented by *quasi* judicial legislation, so as to allow damages to the injured party by way of punishment of the wrong-doer, in cases where none is in-

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flicted by legislative enactment, is, as it would seem, much less defensible than the denial either to the courts or Legislature of the right to add unlimited damages as a punishment in civil cases where a prescribed punishment is already attached to the offence.

Whether the provision that "No person shall be put in jeopardy twice for the same offence" has technical application to the infliction of punishment by way of exemplary damages in civil cases, so as to prohibit it, has been the subject of much learned discussion.

In *Taber v. Hutson*, *supra*, after suggesting that to allow exemplary damages might expose the defendant to double punishment, in violation of the spirit of the Bill of Rights, it was said that "though that provision may not relate to the remedies secured by civil proceedings, still it seems to illustrate a fundamental principle inculcated by every well regulated system of government, viz., that each violation of the law should be certainly followed by one appropriate punishment and no more."

In the case of *Brown v. Swineford*, 44 Wis. 282 (28 Am. R. 582), RYAN, C. J., impliedly admitting that the rule which allowed exemplary damages in such cases was against the spirit of the maxim that no one should be twice vexed for the same offence, said: "The word *jeopardy* is therefore used in the Constitution in its defined, technical sense at the common law. And in this use it is applied only to strictly criminal prosecutions by indictment, information or otherwise." Expressing marked disapprobation of the rule, the learned court nevertheless held that a constitutional provision, similar to that under consideration, did not stand in the way of allowing exemplary damages in civil suits, even when the act complained of was punishable as a crime. So, in the case of *Elliott v. Van Buren*, 33 Mich. 49 (20 Am. R. 668), speaking upon this subject CAMPBELL, J., said: "The argument that a person is thereby punished twice within the constitutional and common law rules is, in our opinion, entirely fallacious. The

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maxim at common law, that no one shall be twice vexed for the same cause, where it applied at all, prevented a second prosecution as well as a second punishment, and if it applied to civil damages would cover the whole, and not merely what is assumed to be a part of them. But there is no analogy between the civil and criminal remedies. The punishment by criminal prosecution is to redress the grievance of the public, while the civil remedy is for private redress."

With great respect for the learned judges from whose opinions we have quoted, we are nevertheless not persuaded to adopt either the reasoning so cogently set forth or the conclusions reached. Whatever may be said in respect of the technical application of the constitutional provision which prohibits double punishment for the same offence to civil remedies, it is difficult to see how the practical result is in any degree mitigated, if in fact, after all other proper elements of damage are considered and allowed in a civil case for a tort for which the defendant is liable to be punished criminally, the jury may assess an unlimited sum as punishment by way of exemplary damages.

It is no answer to the constitutional guaranty against double punishment to say that the penalty, limited and prescribed by the penal code, is to redress the grievance of the public, while the other, unlimited and undefined punishment, awarded by way of exemplary or punitive damages, is for private redress. To the extent that damages are awarded in any case for private redress, they can not be exemplary. The private injury is fully redressed when all its elements are considered and compensated for. Exemplary damages only commence at the point where full private or compensatory damages end, and so long as there remains any private injury to be redressed, no exemplary damages are or can be awarded. The result of it is that to the extent that exemplary damages are allowed in any case which is punishable criminally, the defendant is or is liable to be twice punished for the same offence, once by the State for the public griev-

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ance, and again by the injured party for example's sake, for the supposed benefit of the public, to deter others from the like offending. *Austin v. Wilson*, 4 Cush. 273. The fact that the damages allowed under the name of punitive or exemplary go to the benefit of the injured party, renders the punishment no less real, and as is said by a learned author, "After there has been one trial in which the moral culpability of the defendant has been tried with a view to punishment in the interest of the public, any other trial for the same purpose, whatever may be the form of the proceeding, is in substance and effect, putting the accused again in jeopardy of punishment for the same offence, and vexing him again for the same cause." 1 Sutherland Dam. 740, 741.

In *Fay v. Parker*, 53 N. H. 342 (16 Am. R. 270), this question was fully considered in an opinion conspicuous for its research and learning. The conclusion was there reached that the fundamental maxims of the common law, as well as the provision in the Bill of Rights, were an effectual barrier against the infliction of punitive damages in a civil case where the defendant was subject to be criminally punished for the same offence. FOSTER, J., delivering the judgment of the court, said: "These maxims apply both to criminal and civil proceedings. * * * If, then, this constitutional prohibition of a double penalty is indeed nothing more than an affirmation of the general principle of the common law, applicable alike to civil and criminal cases, making a judgment in one action a bar to another action, founded on the same cause, it follows, logically, that punitive damages are a violation of the general principle of the common law as well as of the Constitution." In further illustration the learned judge said: "Just as firmly is the right secured to him, that in all cases wherein he is charged with conduct such as calls for punishment for the sake of public vengeance or public example (and to him it can make no difference, so long as the blow must fall, whether it comes from the arm of the civil or the criminal law), that he shall be permitted to confront his accusers and their witnesses face

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to face, and not be tried upon depositions, and that he shall go free unless his guilt is proven beyond a reasonable doubt."

This much by way of a re-examination of *Koerner v. Oberly, supra*, seemed proper with a view of determining the ground upon which the decision in the case before us should rest, and upon the assumption that the statute there in question authorized the infliction of unlimited, unrestricted exemplary damages as a punishment for an offence which was also made punishable as a crime, we adhere to the ruling in that case with renewed confidence.

It can not be said that where the Legislature has prescribed one definite penalty as the punishment for an offence, it may, in addition, authorize the injured party, under the guise of exemplary damages, to subject the offender to another uncertain, indefinite punishment which is to be measured only by the varying and unrestrained discretion, or it may be passion, of the jury. If the provision that "No one shall be put in jeopardy twice for the same offence" is, as this court has recognized it to be, a sure protection against the power of the courts in that regard, it must be deemed equally potential against the power of the Legislature. It can not be maintained in reason that it shall be interpreted to mean that the courts can not adjudge a second punishment for the same offence except when expressly authorized by the Legislature, for the reason that in so far as the Legislature attempts to authorize such second punishment, the barrier of the Constitution is as effectual against it as it is against the court.

While the foregoing considerations lead us to adhere to the ruling in *Koerner v. Oberly, supra*, they at the same time direct us to the conclusion that the act here in question is not obnoxious to the objection claimed. The distinction between the case relied on and that under consideration is, that in the first the Legislature, after affixing to the offence a prescribed punishment, undertook to authorize the recovery of exemplary damages, which, as we have seen, implies nothing less than a second punishment for the same offence by way of un-

The State, ex rel. Scobey, v. Stevens et al.

restricted damages for the sake of public example. In the statute here involved, the Legislature has done nothing more than to fix or measure by a definite sum the amount which the injured party shall be entitled to recover on the official bond of the public officer. While the act of taking or making the unlawful charge or demand is made a misdemeanor, punishable by a fine to the State, the Legislature, not by way of additional or double punishment, but for the purpose of defining the liability of the officer to the injured party, has provided that he shall be liable on his official bond in five times the amount of the fees illegally charged, demanded or taken. In such a case, it can be truly said that "the punishment by criminal prosecution is to redress the grievance of the public; while the civil remedy is for private redress."

The legislative assumption is, that the injury done by the public officer who makes the illegal charge, will not be adequately compensated by leaving the parties to their common law rights and liabilities, and accordingly it has provided what in its judgment would be adequate compensation to the one and fixed the just liability of the other. There is in this no element of exemplary or punitive damages.

It can not be said that part of the recovery is allowed by way of example, or for the punishment of the offender, when it is apparent that the legislative purpose is nothing more than to fix the amount of the civil liability of the officer as a measure of compensation for the injury. Who shall say that a person, from or against whom an inconsiderable sum is illegally demanded or charged by an officer who is armed by law with compulsory process to enforce his demand, such person being obliged to incur the expense of a suit to redress his grievance, is more than compensated by a recovery of five times the amount so charged, demanded or taken? This is the measure of recovery fixed in all cases, and no circumstances of fraud, malice or oppression can make it greater.

While it may be conceded that the statute which thus fixes the amount is in a sense penal, the penalty prescribed is nev-

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ertheless fixed by way of compensation for the injury sustained, and to fix the liability of the officer on his bond, executed to the State, for the injurious act. The whole penalty prescribed for the offence, taking the statute altogether, is the fine prescribed to the State, and the liability on the official bond fixed by way of recompense to the injured party, and even regarding the whole statute as penal it can not be said that the person offending has been put in jeopardy of the penalties prescribed until he has been tried for the misdemeanor, and has also answered for the penalty fixed to the injured party as his compensation.

Statutes which fix or limit the amount of recovery which may be had, by way of compensation on the bond of a public officer, or by way of redress for an injury sustained by the tortious act of another, are one thing, while those which provide for unrestricted exemplary damages, by way of public example, after the injured party has been allowed full compensation, are quite another. As was said in *Blatchley v. Moser*, 15 Wend. 215: "The one may be said to be a private remedy, the other a public one for the same offence."

All criminal punishment is of necessity punitive and in a degree exemplary, and when an offender is made the subject of example by being once punished criminally, and is again subjected to exemplary damages in a civil suit for the same offence for a public example, he is put to the hazard of being set up as an example twice for the same offence. Where, however, a statute makes certain conduct a misdemeanor, and annexes to it a prescribed fine to the State, and also provides that the wrong-doer shall be liable to the injured party in a fixed or limited sum; it is certain from the beginning what the consequence of the offence may be, and there is no possibility that the penalties may overlap each other so as to put him in jeopardy of being tried twice, or suffering double the punishment prescribed for the same offence. Of the power of the Legislature to fix the amount of liability on an offi-

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cial bond, recoverable as compensation by the person injured, there can be no question, and this power is not affected by the consideration that the act out of which the liability grows is also punishable criminally; nor can it be doubted that it has the power to prescribe fines and penalties against certain acts, and at the same time fix or limit the civil liability for the same acts.

The next objection urged against the complaint is, that the statute imposing the liability sued for not having been enacted until after the bond in suit was executed, it is contended that it was not competent for the Legislature to increase the common law liability after its execution. Section 5528, R. S. 1881, which was in force at the time the bond was executed, and which, by force of law, became a part of it, provides that "All official bonds shall be payable to the State of Indiana, and every such bond shall be obligatory to such State upon the principal and sureties, for the faithful discharge of all duties required of such officer by any law, then or subsequently in force, for the use of any person injured by any breach of the condition thereof."

Section 5534 makes the sureties on an official bond liable as principals, and prohibits them from making any defence which would not be available to the principal.

It has been held, as the statute plainly implies, that, by force of section 5528, a permanent, continuing liability is created against the officer and his sureties, as well for the failure to discharge any duty imposed by existing law, as for duties required under laws subsequently enacted. *Davis v. State, ex rel.*, 44 Ind. 38; *State, ex rel., v. Davis*, 96 Ind. 539.

One of the duties which the law subsequently enacted imposed upon the officer was, that he should not charge, demand or take more than the fees specified, and for violating this duty a certain liability was imposed, recoverable on his bond. This it was competent for the Legislature to do.

Another objection insisted on is that it does not appear from the averments in the complaint that the illegal fees

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charged were for "official acts done or performed under the provisions of this act."

The averments in that regard are that Stevens was clerk of the Decatur Circuit Court; that upon the dismissal of a certain action pending in that court against the relator, "said Stevens made up and stated upon the fee-books of said court his taxation of the costs in said case against the said Scobey, due to himself as such clerk of said court, therein claiming due him for his costs in said case against said Scobey for his services therein as such clerk a large sum" in excess of the amount legally due. We think it sufficiently appears from these averments, that the fees illegally charged were for acts done in his official capacity as clerk.

There is no force in the objection that the suit on the bond for illegal fees is a collateral attack on the judgment for costs, and that the complaint was for that reason subject to a demurrer. It may be true that as between the parties to a judgment, that part of it which is for costs can not be impeached collaterally any more than the other, the remedy being by motion to re-tax, but a failure to do so can not relieve an officer from his statutory liability if he has in fact charged, demanded or taken illegal fees.

The next and last objection made to the complaint is that the action is for a forfeiture or penalty, and not having been commenced within two years from the date at which the cause of action accrued, it is claimed that it is barred by the first clause of section 293, R. S. 1881, which requires actions for the recovery of a forfeiture or penalty to be commenced within two years. The second clause of the same section provides that "All actions against a sheriff, or other public officer, or against such officer and his sureties on a public bond, growing out of a liability incurred by doing an act in an official capacity, or by the omission of an official duty," shall be barred within five years.

While it may be said that the amount fixed as compensa-

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tion to the injured person, and as the measure of the officer's liability is to a degree in the nature of a penalty, it is nevertheless a liability incurred by doing an act in an official capacity, for which the officer is made liable on his bond, and it is therefore within the terms of the second clause of section 293, above set out.

The cause of action accrued on the 31st day of July, 1879, the date when the illegal fees were charged or taxed, and as the action was commenced within five years from that date, it was not barred.

Judgment reversed, with costs.

Filed Sept. 17, 1885.

DISSENTING OPINION.

ELLIOTT, J.—I concur in the conclusion reached, but I do not agree to all of the reasoning of the prevailing opinion, nor assent to all of the propositions laid down. My opinion is that the question is purely one of legislative power, and that the Legislature may provide for the recovery of punitive damages in cases where an injury is caused by an illegal act, although the same illegal act may subject the defendant to a criminal prosecution. As the Legislature has this power unabridged by constitutional limitation, it has the authority either to limit the amount to be recovered, or to leave it to be ascertained upon a trial. It is not a question for the courts whether the power is wisely or unwisely exercised; the only question for the courts is, Does the power exist and has it been exercised? Once the power is found to exist, all questions of policy and wisdom in its exercise pass outside of the judicial department of the government.

Filed Sept. 17, 1885.

The State v. Bowman.

No. 12,464.

THE STATE v. BOWMAN.

CRIMINAL LAW.—*Indictment.—Endorsement by Foreman in Wrong Place.—*

Motion to Quash.—It is error to quash an indictment merely because the name of the foreman is endorsed in the wrong place, viz., preceding the words "A true bill," instead of on a line with the word "foreman."

From the Monroe Circuit Court.

F. T. Hord, Attorney General, and *J. E. Henley*, for the State.

J. W. Buskirk and *H. C. Duncan*, for appellee.

ELLIOTT, J.—The trial court quashed the indictment, for the alleged reason that the endorsement, "A true bill," was not properly subscribed by the foreman of the grand jury. The indictment is endorsed as follows:

"Charge:

"Selling without license.

"William Peterson.

"A true bill.

"———, Foreman."

It appears from the record that William Peterson was the foreman of the grand jury, and the fault in the endorsement is that he signs above the words, "a true bill," and not on a line with the word "foreman." It has long been the rule that a motion to quash will be sustained unless the indictment is endorsed by the foreman of the grand jury. *Johnson v. State*, 23 Ind. 32; *Heacock v. State*, 42 Ind. 393; *Cooper v. State*, 79 Ind. 206. In the last case, it is strongly intimated that if the record affirmatively showed that the indictment was endorsed by the foreman, the motion would not prevail. We think the record before us does show this. It appears that William Peterson was the foreman of the grand jury; that the indictment was brought into open court, and the name of William Peterson is written on the back of the indictment. As there was but one William Peterson on the

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The State v. Bowman.

jury, and as his name appears on the back of the indictment, the sensible and only natural presumption is, that the signature on the back of the indictment is that of the foreman of that name appointed by the court. The placing of the name above, instead of below the words "A true bill," ought not to destroy the validity of the endorsement, nor should the failure to add the descriptive word "foreman" be permitted to have the effect to render the indictment bad. The name of the foreman is endorsed on the indictment, and the only mistake is in the position in which the name is placed. Bishop gives the proper form for the endorsement of the indictment and adds: "But it is sufficient in law merely to write his name, with no mention of official character, because the latter appears of record. For the like reason, where his whole name is in the record, a signature by initials for his Christian name is adequate." This author also says: "It is immaterial on what part of the bill the foreman's signature appears." 1 Bishop Crim. Proc. (3d ed.), section 698.

It is evident that the error in the form of the endorsement could not have prejudiced the substantial rights of the appellant, and in such cases the statute makes it our duty to disregard all merely technical errors. This is a general rule, and is in harmony with the provision of the statute that an indictment is sufficient when it can be understood therefrom "That the indictment was found by the grand jury of the county" (R. S. 1881, section 1755), and with the further provision that an indictment shall not be quashed "For any other defect or imperfection which does not tend to the prejudice of the substantial rights of the defendant upon the merits." R. S. 1881, section 1756. *Stout v. State*, 96 Ind. 407; *Galvin v. State*, 93 Ind. 550; *Wood v. State*, 92 Ind. 269, see p. 272.

Judgment reversed, with instructions to overrule the motion to quash.

Filed Sept. 22, 1885.

Brown v. Will.

No. 12,237.

BROWN v. WILL.

MARRIED WOMAN.—*Mortgage upon her Separate Real Estate to Secure Husband's Debt.*—*Contract of Suretyship.*—Under section 5119, R. S. 1881, a mortgage executed by a married woman upon her separate real estate to secure her husband's debt, is void.

SPECIAL FINDING.—*Secundum Allegata et Probata.*—*Practice.*—*Pleading.*—A plaintiff can recover only upon the case stated in his complaint; and where the court specially finds in his favor facts showing a cause of action substantially different from that stated in the complaint, he can not recover in that suit.

From the Starke Circuit Court.

H. R. Robbins, for appellant.

G. W. Beeman, for appellee.

HOWK, J.—This was a suit by the appellee Will to foreclose a mortgage alleged to have been executed to him by the appellant Sarah E. Brown and her husband, Williston C. Brown, on certain real estate in Starke county, to secure the payment of their joint promissory note. The mortgage and note were executed on the 31st day of March, 1883, and it was alleged in the complaint that the note was due and unpaid. The cause was put at issue and tried by the court, and, at the defendants' request, the court made a special finding of the facts, and stated its conclusions of law thereon. Over the appellant's exceptions to the conclusions of law, and her motion for a new trial, the court rendered judgment against the defendant Williston C. Brown for the amount due on the note, and against him and the appellant for the foreclosure of the mortgage and the sale of the mortgaged property.

Sarah E. Brown has alone appealed to this court, and has here assigned as error, among others, that the court erred in its conclusions of law.

The court found the facts to be, substantially, as follows:

"1. The defendants executed the note and mortgage in suit on the day and date thereof, and the mortgage was duly re-

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| 144 | 24 |
| 146 | 173 |
| 103 | 71 |
| 150 | 396 |
| 103 | 71 |
| 150 | 165 |

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corded in the mortgage record of Starke county, Indiana, at the time indicated by the minutes of the recorder endorsed thereon.

"2. The consideration of the note was \$80 cash borrowed of the payee, the plaintiff, by Williston Brown, one of the defendants, and the payment by the plaintiff of a note of the defendant Williston Brown for about the sum of \$40, and \$79 of the cash secured of [by?] Williston Brown was immediately applied by him to the payment of a note for a similar amount, due to one Koffle, and secured by a mortgage on the premises described in the mortgage in suit.

"3. The premises mentioned and described in the mortgage in suit are, and were at the time of the execution of the note and mortgage, the separate property of Sarah E. Brown, one of the defendants herein.

"4. The defendant Sarah E. Brown is and was, at the date of the execution of the note and mortgage in suit, the wife of her co-defendant, Williston C. Brown.

"5. The defendant Sarah E. Brown borrowed no money of the plaintiff for which the note was given, and she did not know at the time her husband borrowed the money for what purpose the money was borrowed. She signed the note and mortgage as security for her husband, as she understood it at the time. She purchased the property mentioned in the mortgage with her own means. At the time she purchased the property, and at the time she executed the note and mortgage in suit, the property was encumbered by a mortgage for \$79, which was due to one Koffle. Williston C. Brown, out of the funds borrowed of the plaintiff, and for which the mortgage in suit was given, paid off and discharged the Koffle mortgage. The note in suit is due and unpaid, and there is due thereon, of principal and interest, the sum of \$138."

Upon the foregoing facts the court stated the following conclusions of law :

"1. The defendant Williston C. Brown is alone personally liable on the note in suit.

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"2. The mortgage is a valid and subsisting lien on the property therein described for the security of the entire amount of the note in suit."

The question for our decision is this: Did the trial court err, as against the appellant, in its second conclusion of law? It can not be doubted, as it seems to us, that this question must be answered in the affirmative. The mortgaged real estate was found to be the separate property of the appellant Sarah E. Brown, and the mortgage thereon was executed by her and her husband, Williston C. Brown, on the 31st day of March, 1883, to secure the payment of the husband's debt. When the mortgage was executed, section 5119, R. S. 1881, was and had been in force since September 19th, 1881, as a part of the law of this State. In this section of the statute it is provided as follows: "A married woman shall not enter into any contract of suretyship, whether as endorser, guarantor, or in any other manner; and such contract, as to her, shall be void." In *Dodge v. Kinzy*, 101 Ind. 102, the court said: "The provisions of this section of the statute are too plain to be misunderstood. They positively forbid a married woman to enter into any contract of suretyship, in any manner, and as positively declare that any such contract, as to her, shall be void." Accordingly, it was there held that a mortgage executed by husband and wife, on land held by them as tenants by entireties, to secure the individual debt of the husband, was, as to the wife, a contract of suretyship within the meaning of the statute, and that such mortgage was void as to the wife. So, in *Allen v. Davis*, 99 Ind. 216, it was held by this court that since section 5119, *supra*, went into force, a married woman can not execute a binding mortgage upon her real estate to secure her husband's debt. See, also, *Allen v. Davis*, 101 Ind. 187, to the same effect.

Upon the facts found by the court, we are of the opinion, therefore, that as to the appellant, Sarah E. Brown, the mortgage in suit was and is, under the statute, a contract of sure-

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tyship, and as to her was and is void and of no binding force.

It is claimed, however, by appellee's counsel, that inasmuch as the court found that \$79 of the note in suit was immediately applied by Williston C. Brown "to the payment of a note for a similar amount, due to one Koffle, and secured by a mortgage on the premises described in the mortgage in suit," therefore, the latter mortgage is valid and binding on her and her real estate to the extent of the \$79 so applied, because she is to that extent a principal in the note in suit. This position is not sustained, we think, by the facts found by the court within the issues in the cause. There is no reference whatever to the Koffle mortgage in any of the pleadings in the cause, and the facts found by the court, in relation to the application of any of the money borrowed by Williston C. Brown of the appellee to the payment and discharge of the Koffle mortgage, were wholly foreign to and outside of the issues in this action. The rule is familiar, and has been recognized and approved in many of the decisions of this court, which requires that the plaintiff must recover *secundum allegata et probata*, or not at all. He must recover upon the case stated in his complaint, and where the court finds in his favor a cause of action substantially different from that stated in his complaint, he can not recover in that suit. *Terry v. Shively*, 64 Ind. 106; *Phoenix Mut. Life Ins. Co. v. Hinesley*, 75 Ind. 1; *Thomas v. Dale*, 86 Ind. 435; *Carter v. Carter*, 101 Ind. 450.

We are of opinion that upon the issues in the cause, and the facts found within those issues, the trial court erred in its second conclusion of law as against the appellant, Sarah E. Brown.

The judgment against the appellant, Sarah E. Brown, is reversed with costs, and the cause is remanded with instructions to the court to state, as its second conclusion of law, that the mortgage in suit, as to Sarah E. Brown, is void and of no binding force, and to render its judgment accordingly.

Filed Sept. 19, 1885.

The State v. Cooper et al.

No. 12,466.

THE STATE v. COOPER ET AL.

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CRIMINAL LAW.—*Motion for Discharge.*—*Bill of Exceptions.*—*Practice.*—*Supreme Court.*—A motion by a defendant to be discharged from custody, the affidavit supporting it, and the ruling of the court thereon, not being brought into the record by bill of exceptions or order of court, no question in relation thereto is presented for the decision of the Supreme Court.

SAME.—*When Bill of Exceptions not Necessary.*—It is only where all the essential facts, necessary to show the ground upon which a ruling of the trial court was made, appear upon the face of the legal record, that no bill of exceptions is required to present such ruling for review on appeal.

SAME.—*Copying Papers into Transcript.*—The mere copying of papers into the transcript by the clerk does not make them part of the record.

From the Sullivan Circuit Court.

J. D. Alexander, Prosecuting Attorney, *J. C. Briggs* and *W. C. Hultz*, for the State.

J. T. Hays, *H. J. Hays*, *W. S. Maple*, *A. A. Holmes* and *S. C. Coulson*, for appellees.

MITCHELL, C. J.—An information based upon the affidavit of Harry Blue, charging William Cooper and Perry Cooper with a conspiracy to commit a felony, was presented to the Sullivan Circuit Court at its June term, 1883. The defendants pleaded in abatement that no such person as Harry Blue, by whom the affidavit purported to be signed and sworn to, existed at the time it was made, but that the person who signed and swore to it was one Henry, *alias* Harry, Little. A demurrer was overruled to the plea, and the State refusing to reply or plead further, it was ordered by the court that the defendants be discharged from custody, and that "they go hence without day." Thereupon the State appealed to this court, and the order of the circuit court was reversed. *State v. Cooper*, 96 Ind. 331.

After the reversal the defendants were, upon the motion of the prosecuting attorney, arrested upon a bench-warrant, and

• The State v. Cooper *et al.*

required to enter into recognizance for their appearance from time to time until the case should be disposed of. The case was continued from one term to another upon the application of the State, until the 7th day of April, 1885, when the defendants filed a written motion, supported by affidavit, asking that they be discharged from custody. This motion was sustained by the court, and the ruling excepted to. Thereupon it was again ordered that the defendants be discharged. This order was excepted to, and the State again brings the record here on appeal.

The error assigned and insisted upon is, that "the court erred in discharging the defendants over the objection of the appellant."

Counsel for appellees contend that because the motion upon which the court ordered the discharge, and the affidavit supporting it, and the ruling of the court thereon, are not brought into the record by bill of exceptions or by order of the court, no question is presented for decision. The contention of appellant is that the error alleged is apparent upon the face of the record, and that no bill of exceptions was necessary. It is true that where all the essential facts necessary to show the ground upon which a ruling of the trial court was made appear upon the face of the record, no bill of exceptions is required to present such ruling for review upon appeal. Accordingly, in *Doctor v. Hartman*, 74 Ind. 221, it was held that the ruling of the court on a motion to dismiss a cause for want of jurisdiction, where the want of jurisdiction was apparent on the face of the record, was presented without a bill of exceptions. This rule can only be applied to cases where the error, if error occurred, is apparent upon looking at what properly belongs to the record. In speaking of matters which appear on the record, only such things are meant as pertain to the legal record. *Scotten v. Divilbiss*, 60 Ind. 37; *Lippman v. City of South Bend*, 84 Ind. 276; *Hancock v. Fleming*, 85 Ind. 571.

A motion by a defendant to be discharged from custody

The State v. Cooper *et al.*

need not be in writing, and if in writing it is not required to state the reasons upon which the discharge is asked. The motion may be based upon matter lying entirely outside of the record. It may be supported by affidavits, or records, or other evidence *aliunde*, in which case neither the motion, affidavits, records or other evidence, nor the ruling thereon, are legally a part of the record, unless made so by order of the court, or by bill of exceptions. In the case before us, a written motion appears to have been filed, which is supported by an affidavit which embodies other records. These are all copied into the transcript by the clerk, but, as has been repeatedly held, this does not make them part of the record unless they receive the sanction of the court by being embodied in a bill of exceptions in the manner provided by law. With these eliminated, it would not be contended that the error was apparent upon the face of the record. To all intents and for all purposes they are out of the record.

In the case of *Beard v. State*, 57 Ind. 8, the defendant moved to dismiss the proceedings and to be discharged from custody. The motion was overruled, and in delivering the judgment of this court, on defendant's appeal, Howk, J., said: "Appellant's motion to dismiss the proceedings in this cause, and for his discharge from the custody of the sheriff, the decision of the court below thereon, and appellant's exception to such decision, were not made a part of the record by a proper bill of exceptions. The second alleged error, complained of by appellant, is not apparent, therefore, in the record of this cause, and no question is thereby presented for our consideration." We see no reason why the settled rule, applied in the foregoing case against the defendant, should not be equally applicable to the State.

We may with propriety say, that if no other reasons than those set out in the motion which the clerk has copied into the transcript, appeared to the court below, it can hardly be said that any ground was shown justifying the defendant's discharge, but as we are bound to presume that the ruling of

Middaugh v. The State.

the court was right, in the absence of a bill of exceptions showing anything to the contrary, we can do nothing except to affirm its judgment, and accordingly the judgment is affirmed.

Filed Sept. 18, 1885.

No. 12,426.

MIDDAUGH v. THE STATE.

CRIMINAL LAW.—*Winning Money upon Game or Wager.*—*Pool.*—*Indictment.*—Under section 2081, R. S. 1881, an indictment charging, in substance, that the defendant did unlawfully play for money, to wit, ten cents, at and upon a certain game of pool, played by him with two named persons upon a billiard and pool table, and did unlawfully win from one of such persons, naming him, the sum of ten cents, etc., is sufficient.

SAME.—*Insufficiency of Evidence to Sustain Conviction.*—Evidence that the defendant and two other persons had played a game of pool in the defendant's saloon, that the amount played for was ten cents, and that one of such persons lost the game and paid for it, but not showing to whom, is not sufficient to sustain a conviction.

SAME.—*Winning upon Game Implies Wager.*—Winning at or upon a game implies a wager of some kind.

From the Henry Circuit Court.

J. Brown and *W. A. Brown*, for appellant.

F. T. Hord, Attorney General, and *W. B. Hord*, for the State.

NIBLACK, J.—This was a prosecution by indictment against Middaugh, the appellant, for winning ten cents from one Jeffreys on a game of pool. A motion to quash the indictment being first overruled, a jury returned a verdict of guilty as charged, and notwithstanding an objection to the sufficiency of the evidence to sustain the verdict, the appellant was adjudged to pay a fine of twenty-five dollars.

The indictment charged "that Clark Middaugh, at said county" (of Henry), "on the 4th day of October, A. D.

Middaugh v. The State.

1884, did then and there unlawfully play for money, to wit, the sum of ten cents, at and upon a certain game of pool played by him with John Cox and Homer Jeffreys upon a billiard and pool table, and did then and there, and thereby, unlawfully win, of and from said Homer Jeffreys, the sum of ten cents, of the current and lawful money of the United States, of the value and denomination of ten cents."

So much of section 2081, R. S. 1881, under which this indictment was returned, as has any special application to the facts charged, reads as follows: "Whoever, by playing or betting at or upon any game or wager, * * * * either loses or wins any article of value, shall be fined in any sum not more than one hundred dollars nor less than five dollars, to which may be added imprisonment in the county jail not more than three months nor less than ten days."

Applying this section of the statute to the facts charged, we see no objection to the substantial sufficiency of the indictment.

Cox, one of the persons named in the indictment, was the only witness examined at the trial. He testified, that at the time named in the indictment, the appellant kept a saloon in Newcastle, in Henry county, called the Arcade; that he had played pool with persons in the appellant's saloon; that at one time, during the fall or early part of the winter in the year 1884, he had played pool in that saloon with Homer Jeffreys and the appellant; that the amount played for at that game was ten cents; that Jeffreys lost the game and paid for it. This was the substance of all the evidence given at the trial. This evidence palpably failed to prove that the appellant won ten cents, or any other sum, from Jeffreys, by means of or upon the game to which the witness referred. The witness did not, as will be observed, state to whom Jeffreys lost the game, nor whom he paid for it. Jeffreys may have lost the game and paid some person for it, and yet the appellant may not have been the winner. Nor did it follow from the statements of the witness, that Jeffreys lost the game

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upon a wager, either express or implied. Winning at or upon a game implies a wager of some kind. The verdict was, consequently, not sustained by sufficient evidence, and a new trial ought to have been granted.

The judgment is reversed, and the cause remanded for a new trial.

Filed Sept. 22, 1885.

No. 11,919.

THE WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY v. LASH.

RAILROAD.—Killing Animals.—Fences.—Action Before Mayor.—Possession of Road.—Complaint.—A complaint against a railroad company before the mayor of a city, to recover damages for animals killed on the track of the railroad at a point where the same was not securely fenced, alleging that such animals "entered upon the said railway, and were then and there, by the locomotive, cars and carriages of the said defendant, killed," etc., sufficiently shows that the defendant was in possession of the road and operating the train.

SAME.—Pleading and Practice Before Mayor.—Appeal.—Where a cause is commenced before a mayor, the rules of pleading and practice before that tribunal must be observed in the circuit court on appeal, and a complaint sufficient before a mayor is sufficient in the circuit court.

SAME.—Jurisdiction of Mayor.—Within the city limits, a mayor has the jurisdiction and powers of a justice of the peace; but, as a general rule, an action may be brought before him upon a contract made or for a tort committed without the city, if the defendant lives in the city.

SAME.—Appearance.—Waiving Objection to Jurisdiction.—By entering a full appearance, without objecting to the jurisdiction of the court, such objection is waived.

From the Warren Circuit Court.

C. B. Stuart and W. V. Stuart, for appellant.

L. Nebeker and H. H. Dochterman, for appellee.

ZOLLARS, J.—Sections 4025, *et seq.*, R. S. 1881, relating to the liabilities and obligations of railroad companies, make them liable for the value of animals which enter upon the track and

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| 141 | 410 |
| 103 | 80 |
| 155 | 440 |
| 103 | 80 |
| 159 | 19 |

The Wabash, St. Louis and Pacific Railway Company v. Lash.

are killed at points where the proper and required fences have not been maintained.

This action is based upon that statute. The case was commenced and prosecuted to judgment before the mayor of Attica, in Fountain county. After appeal and change of venue, the case was tried and judgment rendered against appellant in the Warren Circuit Court. From that judgment the appeal was taken to this court.

Appellant now assails the complaint, and by counsel contends: First. That it is defective because it does not charge that the killing was in Fountain county; Second. Because it does not charge that the animals entered upon the track at a place where the track was not securely fenced; and, Third. Because it is nowhere shown that the appellant, its assignees, or lessees, or a receiver, were in possession of the road, or that any one else, for whose conduct it is responsible, was operating, running or controlling the locomotive, cars and carriages, which are alleged to have killed the animals. The first two objections are overthrown by the complaint, which has been sent up on *certiorari* since the filing of appellant's brief.

We set out one paragraph of the complaint, which so far as the objections go, is like each of the other paragraphs. It is as follows: "The plaintiff complains of the defendant and says, that heretofore, to wit, on or about the 5th day of March, 1882, near the city of Attica, in the county of Fountain and State of Indiana, at a point on the defendant's railway, where said railway was not securely fenced in, the plaintiff's three several hogs, of the value of thirteen dollars, entered upon the said railway, and were then and there, by the locomotive, cars and carriages of the said defendant, killed, to the damage of the plaintiff thirteen dollars, for which he prays judgment."

It is very plainly averred here, that the animals entered upon the track at a place where it was not securely fenced, and that the killing was in Fountain county. In the title of

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the case, appellant is named as the defendant. The charge is, that the animals entered upon the defendant's railway and were killed by the locomotive, cars and carriages of the defendant on its railway. It is not charged in plain and emphatic language that the defendant was in the possession of its railway, nor that the train was being run and operated by the defendant, but the language used affords strong ground for an inference that it was so in possession, and operating the train. The case of *Wabash, etc., R. W. Co. v. Rooker*, 90 Ind. 581, is not conclusive here for two reasons: First. In that case, the averments are not the same as here. In that case, the charge was, that the "said locomotive and train of cars, and each of them, were at the time of said respective accidents being run and controlled by said defendant, or some lessee thereof, or other person unknown to the plaintiffs." It was held that the alternative averments neutralized each other, so that there was, in effect, an absence of any allegation that the appellant had in any way injured the property of the plaintiff. On account of the alternative statements in that case, there could not be even an inference as to what corporation or person was operating the train, or whether or not it was being operated by a trespasser. That can hardly be said of the case before us.

In the second place, that was an action commenced in the circuit court, where the rules of pleading and practice are much more exact and technical than before justices of the peace or mayors. It is not necessary for us to decide, and we do not decide, that the complaint before us would be sufficient had the case been commenced in the circuit court. After a careful examination and consideration of the objection urged by counsel, we feel constrained to hold that, as the case was commenced before a mayor, where the rules of pleading and practice before a justice of the peace obtain, the complaint contains a sufficient statement of facts to withstand the demurrer directed against it. The demurrer was filed in the circuit court, but the cause having been commenced before

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the mayor, the rules of pleading and practice before that tribunal must be observed in the circuit court on appeal. The complaint, being sufficient before the mayor, was sufficient in the circuit court. *Carter v. Edwards*, 16 Ind. 238; *Bernhamer v. Conard*, 45 Ind. 151; *Hill v. Sleeper*, 58 Ind. 221.

By a long line of decisions, some averments, which are deemed necessary and essential in a complaint in a case commenced in the circuit court, may be omitted when the case is commenced before a justice of the peace or mayor. For example, it has been many times held by this court, that in a case of this character, if the action is commenced in the circuit court, the complaint, to be sufficient, must contain the averment that the animals entered upon the railroad at a point where it was not fenced, and that this averment may be omitted in a complaint in a like case before a justice of the peace or mayor. We cite some of the cases: *Toledo, etc., R. W. Co. v. Stevens*, 63 Ind. 337; *Indianapolis, etc., R. R. Co. v. Sims*, 92 Ind. 496; *Louisville, etc., R. W. Co. v. Argenbright*, 98 Ind. 254; *Ohio, etc., R. W. Co. v. Miller*, 46 Ind. 215; *Pennsylvania Co. v. Rusie*, 95 Ind. 236.

If this averment, deemed essential in the circuit court, may be omitted in a complaint before a justice of the peace or mayor, it would seem very clear that the complaint before us should not be overthrown because of its indefiniteness or omission as to the possession of the road and the operation of the train that caused the injury, if in any case such averments are necessary. More directly in point than the cases above cited is the case of *White Water Valley R. R. Co. v. Quick*, 30 Ind. 384. In this case the averment was that "a locomotive owned and used by the said defendant, on its railroad, * * * struck, ran against and over, and killed, one hog, * * * and that at the time and place of killing the road was not fenced." It was contended that this did not show that the railroad company committed the injury. It was held "that by such liberality of construction as pleadings before

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justices of the peace should receive, the complaint is sufficient," in this particular.

As heretofore stated, this case was commenced before the mayor of Attica. The complaint charges that the animals went upon the track and were killed near the city of Attica. This shows, we think, that the killing was without the corporate limits of the city. It is contended by counsel for appellant, that because the animals thus entered upon the track and were killed without the city limits, the mayor had no jurisdiction, and that hence the circuit court erred in overruling appellant's motion to dismiss the case. The statute in relation to fencing provides, that when animals are killed upon a railroad track that has not been fenced as by that act required, the owner may bring his action before any justice of the peace of the county in which the killing is done. R. S. 1881, section 4026.

In the general law for the incorporation of cities, the civil jurisdiction of the mayor is fixed by the following language: "He shall have, within the limits of said city, the jurisdiction and powers of a justice of the peace in all matters civil, and criminal, arising under the laws of this State." R. S. 1881, section 3062. One case, at least, has been passed upon by this court in which the jurisdiction of the mayor in such cases passed unchallenged. *Toledo, etc., R. R. Co. v. Stevens*, 63 Ind. 337. A paragraph of the complaint was held good in which it was averred that the killing was without the city limits. It is proper to say that in that case no question seems to have been made as to the jurisdiction of the mayor.

The general rule is that the statutes limiting the jurisdiction of justices of the peace to their townships have more especial reference, in civil cases, to the residence of the defendant. The action may be upon a contract made, or for a tort committed, without the township, if the defendant lives in the township. This same general rule will apply to the mayor. If, then, in any case, the mayor has jurisdiction of the defendant railroad company, and the killing is done

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within the city limits, there would seem to be no ground for claiming that the mayor has not jurisdiction of the subject-matter, because, within the city limits, he has the jurisdiction and powers of a justice of the peace. The action is not an action *in rem*, but against the corporation. This being so, it would seem to make no difference that the killing may have been done without the city limits. In this case, it is not necessary for us to decide that the corporation was, or could be, a resident of the city, although it appears from the record that it had an agent within the city. If it was not a resident of the city, and if that fact would defeat the jurisdiction of the mayor, that question should have been made below, and before a full appearance was made to the action by the defendant. If not so made, the objection will be deemed to have been waived, and can not be made afterwards. *Nesbit v. Long*, 37 Ind. 300; *Mayes v. Goldsmith*, 58 Ind. 94; *Aurora Fire Ins. Co. v. Johnson*, 46 Ind. 315.

In the case before us, appellant appeared before the mayor and filed a demurrer to the complaint. Upon what ground the demurrer was based we can not tell, because the demurrer is not in the record. After the appeal to the Fountain Circuit Court, the parties appeared, and the case was set for trial; before the day set for trial, the venue was changed to the Warren Circuit Court upon the motion of appellant, supported by affidavit. At the first term of the Warren Circuit Court, after the change was perfected, the parties appeared, and the cause was continued. At the next term of that court, the cause was again set for trial on a day fixed. Before that day, appellant moved to dismiss the case, upon the ground that the mayor, before whom the case was commenced, had no jurisdiction, because the killing occurred without the limits of the city of Attica. After the overruling of this motion, appellant filed a demurrer to the complaint, one cause of which challenged the jurisdiction of the court over the subject-matter of the action. It thus appears that appellant voluntarily appeared, and at no time ques-

Carrico *et al.* v. Tarwater.

tioned the jurisdiction of the court over it. Any objection that might have been urged upon that ground must, therefore, be deemed to have been waived. For the purposes of this case, therefore, it must be assumed that the mayor had jurisdiction over appellant, and, that being so, it seems to be immaterial that the killing was not within the city limits. We are thus constrained to hold that the motion to dismiss, and the demurrer calling in question the jurisdiction of the court over the subject-matter of the action, were properly overruled.

Having found no available error in the record, the judgment is affirmed, with costs.

Filed Sept. 19, 1885.

No. 12,383.

CARRICO ET AL. v. TARWATER.

JUDGMENT.—*Non-Resident.*—*Notice by Publication.*—*Defective Affidavit.*—*Review.*—*Appeal.*—Where a judgment has been rendered upon notice by publication, founded on an insufficient affidavit, the remedy of a party to such judgment is by a complaint for review or by appeal.

SAME.—*Former Adjudication.*—*Evidence.*—In a subsequent suit covering the same subject-matter and between the same parties, the record of such judgment is competent evidence for the purpose of showing a former adjudication of the matter in controversy.

From the Sullivan Circuit Court.

C. E. Barrett, W. S. Maple and R. V. Railsback, for appellants.
J. M. Humphreys and T. J. Wolfe, for appellee.

Howk, J.—This was a suit by the appellants against the appellee to obtain the partition of certain real estate in Sullivan county, whereof they alleged that they were the owners in fee simple of the undivided one-half in value, and that appellee was the like owner of the residue. Issue was joined by appellee's answer in denial of the complaint, and the trial of the cause by the court resulted in a finding for the appellee, the defendant below. Over the appellants' motion for a

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new trial, judgment was rendered against them for appellee's costs, and denying the prayer of their complaint.

The overruling of their motion for a new trial is the only error of which the appellants complain in this court.

On the trial of this cause, the appellee offered in evidence the record and files of the court below, at its December term, 1867, in a former suit between the parties to this action for the partition of the real estate now in controversy, and other lands, in which former suit the appellee, Tarwater, was plaintiff and the appellants herein were defendants, for the purpose of proving a former adjudication of the matters in issue in the pending suit. Over the objections and exceptions of the appellants, this offered evidence was admitted by the court, and the rulings of the court, in the admission of such evidence, were assigned, as errors of law, as causes for a new trial. The first objections urged by the appellants' counsel, in argument, to the admission of the record of the former partition, are, that "there was no valid or legal service upon defendants, and because the court had no jurisdiction over the persons of the defendants in such partition proceedings." It is shown by the record in the former suit, that a summons, issued thereon on November 8th, 1867, was returned by the sheriff of Sullivan county, "Served November 15th, 1867, by reading to Thomas Carrico in person." As to the other appellants, defendants in the former suit, the record given in evidence shows that due proof was made to the court, "that the pendency of this cause has been duly advertised by publication in the *Sullivan Democrat*, a weekly newspaper of general circulation, printed and published in Sullivan county, for three weeks successively, for more than thirty days prior to the first day of the present term of this court as against the non-resident defendants."

No objection has been pointed out, and we can see none, to the summons or the service thereof in the former suit on the appellant Thomas Carrico. As against him, therefore, the record objected to was clearly competent evidence, and,

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as such, there was certainly no error in the admission of such record in evidence, over the joint objections of all the appellants, Thomas Carrico included. The appellants jointly objected to the admission of the record of the former suit in evidence, "because the affidavit for publication," as against the non-resident defendants therein, "was null and void." This is the objection to the admission of the record in evidence, which the appellants insist the trial court ought to have sustained. In overruling this objection, it is claimed that the court below erred, and it is for this error alone that the appellants ask for the reversal of the judgment below, in the pending suit.

Conceding, without deciding, that the joint objection of the appellants and the ruling of the court thereon present the error, of which they complain, we will consider the sufficiency of the grounds whereon they ask for the reversal of the judgment. The affidavit for notice by publication, as to the non-resident defendants in the former suit, stated merely that the defendants in such suit were all non-residents of the State of Indiana. It is certain that this affidavit does not comply even substantially with the requirements of section 38 of the civil code of 1852 (2 R. S. 1876, p. 49), in force at the commencement and during the pendency of the former suit. But it is equally certain that such affidavit does comply, not alone substantially, but almost literally, with the provisions of section 3 of the act of May 20th, 1852, "concerning the partition of lands" (2 R. S. 1876, p. 344), also in force at the commencement and during the pendency of such former suit. It may be said, however, that section 38 of the civil code of 1852 was a later expression of the legislative will concerning the requisites of an affidavit for publication than section 3 of the partition act of May 20th, 1852, and that such an affidavit must, therefore, in all civil actions, conform to the requirements of the later law. If this were so (a point which we need not and do not decide), the most that can be said is that the affi-

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davit for publication in the former suit was defective and insufficient, and did not authorize the publication of notice to the non-resident defendants. In that event, it was error for the court to decide, as it did in the former suit, that notice of its pendency had been duly given by publication to the non-resident defendants therein. *Fontaine v. Houston*, 58 Ind. 316. But, for such an error, the remedy of a party to the judgment in such former suit is a complaint for review or an appeal to this court, brought within the time and in the manner prescribed by law. *Dowell v. Lahr*, 97 Ind. 146.

In the former suit, the court below had jurisdiction of the subject-matter of the action ; it acquired jurisdiction of the person of Thomas Carrico, one of the defendants in that suit and a plaintiff and appellant in the case at bar, by the personal service of a summons on him ; and it decided, as it had to decide before it could proceed with the trial or hearing of such suit, that it had acquired jurisdiction of the other and non-resident defendants therein by the due publication of notice of the pendency thereof. No appeal was ever taken from the judgment and decision of the court in the former suit, nor was any complaint ever filed for the review thereof. But such judgment and decision have remained, and still remain, in full force, and have never been reversed, annulled or set aside. Sixteen years after such judgment and decision were made and rendered, the plaintiffs and appellants in the pending suit, ignoring, or attempting to ignore, the former partition, instituted this action to obtain a further partition of the land then set off and assigned to the appellee in severalty. Since the former judgment and decision, there has been no substantial change in the titles of the parties to the litigation, nor in the interests they claim in the land in controversy. We conclude, therefore, that the record of the former suit was competent evidence and properly admitted over appellants' objections, and that such record showed such a former adjudication of the matters in controversy as con-

 Shafer v. Ferguson.

stituted a complete bar of the pending action. *Elwood v. Beymer*, 100 Ind. 504.

We have found no error in the record of this cause.

The judgment is affirmed, with costs.

Filed Sept. 17, 1885.

No. 11,762.

SHAFFER v. FERGUSON.

SUPREME COURT.—*Practice.*—*Record.*—*Objections to Testimony.*—The record must set forth the objections to testimony that were stated to the trial court, and only these objections can be urged in the Supreme Court. **SAME.**—*Objections Must be Specifically Stated.*—Objections must be specifically stated, to be available.

From the Carroll Circuit Court.

A. W. Reynolds, J. H. Wallace and E. B. Sellers, for appellant.
R. Gregory, for appellee.

ELLIOTT, J.—The only question argued by the appellant is that arising upon the ruling of the trial court in admitting the testimony of Alexander Conklin.

It is settled that the record must set forth the objections to the testimony that were stated to the trial court, and that no objections can be urged here except those stated to the court upon the trial. It is also settled that objections must be specifically stated, or they will be of no avail. *Bottenberg v. Nixon*, 97 Ind. 106; *Jones v. Angell*, 95 Ind. 376; *Lake Erie, etc., R. W. Co. v. Parker*, 94 Ind. 91; *Harvey v. Huston*, 94 Ind. 527; *McClellan v. Bond*, 92 Ind. 424; *Stanley v. Sutherland*, 54 Ind. 339. The objections stated to the trial court in this cause are not sufficiently specific.

Judgment affirmed.

Filed Sept. 23, 1885.

The Western Union Telegraph Company v. Ferris.

No. 10,709.

THE WESTERN UNION TELEGRAPH COMPANY v. FERRIS.

TELEGRAPH COMPANY.—*Failing to Transmit Message to Point Without the State.—Statutory Penalty.—Constitutional Law*—Section 4176, R. S. 1881, prescribing a penalty against telegraph companies for failing to transmit a message, is valid and constitutional, whether the message is to a point within or without the limits of this State.

SAME.—*Pleading.—Answer.*—To a complaint against a telegraph company, to recover the statutory penalty, alleging that such company received and failed to transmit a message for which the usual charge had been paid, an answer averring that a message was seasonably transmitted, but not identifying it in any way as the message referred to in the complaint, is bad.

PLEADING.—*Exhibit.—Practice.*—An exhibit, attached to an answer, which is not the foundation of the defence, does not become part of it, and can not be looked to in determining its sufficiency.

SUPREME COURT.—*Practice.—Brief.—Waiver.*—A question not made in the original brief of appellant, nor until the brief of the appellee has been filed and the case taken up for consideration by the court, may be considered as waived.

From the Shelby Circuit Court.

J. E. McDonald, J. M. Butler and A. L. Mason, for appellant.
E. P. Ferris, W. W. Spencer and J. S. Ferris, for appellee.

MITCHELL, C. J.—This was an action to recover the penalty prescribed by section 4176, R. S. 1881, against telegraph companies negligently failing to transmit messages delivered to them during usual office hours.

The complaint avers that, on the 2d day of December, 1882, the plaintiff delivered a certain message to the defendant's operator, at its office in Shelbyville, Indiana, for transmission to Chicago, Illinois, and that according to its regulations he paid to it forty cents as the price of such service. The message to be sent is set out in the body of the complaint and is in the language following:

"SHELBYVILLE, IND., Dec. 2d, 1882.

"*Harry C. Chapman, Chicago, Ill.:*

"Yes, if we can have books by Monday.

"JOHN S. FERRIS."

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| 108 | 91 |
| 126 | 62 |
| 126 | 135 |
| 103 | 91 |
| 137 | 64 |
| 103 | 91 |
| 147 | 659 |

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It is averred "that the defendant wholly failed and refused to transmit said message," to the plaintiff's damage, etc.

After a demurrer was overruled to the complaint, the defendant answered that, on the 2d day of December, 1882, one Harry C. Chapman delivered to it, at its branch office at the Clifton House in Chicago, Illinois, a certain message directed to John S. Ferris, at Shelbyville, Indiana, a copy of which is attached to the answer as an exhibit, which message, it is alleged, was transmitted to Ferris without delay; that at the time the message was sent by Chapman to Ferris, the defendant's operator, to whom it was delivered at Chicago for transmission, was directed by Chapman to deliver the answer, when it came, at the Clifton House, Chicago, and that Ferris received the telegram so sent. It is then averred that Ferris, "fifty-five minutes after 2 o'clock P. M. of said day, filed in the defendant's office, at Shelbyville, Indiana, the following described message, written upon a blank form furnished by said defendant for use by its patrons, a true copy of which said message and a blank upon which the same was written, said blank containing in print the terms and stipulations upon which the defendant undertook to transmit and deliver said message, is made a part hereof and for identification marked 'Exhibit B.'" It is then averred "that said John S. Ferris did not pay or tender to defendant any money for the transmission and delivery of said message at the time he filed the same in defendant's office," and that he did not direct that the message should be repeated nor pay for repeating it; that the defendant's operator at Shelbyville "did, in due and proper order of time, transmit said message, 'Exhibit B,' from Shelbyville to Chicago, and that the message, 'Exhibit B,' was delivered to the hotel clerk of the Clifton House, Chicago, without delay and in due and proper order of time."

In the paper marked "Exhibit B," filed with the answer we find, following various stipulations, reciting the terms upon which messages are received and sent, the following:

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"To Harry C. Chapman, Chicago, Ill.:

"Yes, if we can have the books by Monday.

"JOHN S. FERRIS."

The court below sustained a demurrer to the answer, and, the defendant refusing to plead further, judgment was rendered in favor of the plaintiff below for the statutory penalty. An appeal from this judgment brings the record before us, upon which two questions are made, one of which involves the sufficiency of the complaint, the other the answer.

The learned counsel argue that the statute upon which the action is founded is unconstitutional, in so far as it applies to telegraph messages which are to be transmitted beyond the limits of the State. Taking counsel's premise as true, the conclusion to which the argument leads is, that inasmuch as the telegram was to be sent to another State, the complaint to recover the penalty is bad, for the reason that the statute giving the action is an attempt to regulate inter-state commerce and is therefore void. The question thus made has been considered by this court in several cases, and the constitutionality of the statute has been steadily affirmed. In a recent case, *Western Union Tel. Co. v. Pendleton*, 95 Ind. 12 (48 Am. R. 692), the question was again carefully and exhaustively examined, and the authorities relied on by counsel in this case fully considered, and the deliberate conclusion was reached that the previous rulings would be adhered to. The question should be considered at rest in this tribunal.

Moreover, as this question was not suggested in the original brief and argument of appellant's counsel, nor until after the brief for appellee had been filed and the case taken up for consideration by the court, we think it might well be regarded as waived, and for that reason, if we considered the question an open one, we should not feel compelled to consider it under the rules of practice here.

Waiving the supposed technical objection to the manner in which the exception is saved to the ruling of the court in

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sustaining the demurrer to the answer, we have no doubt that the ruling in that behalf was right.

It is argued by counsel that the answer was a plea in bar, by way of confession and avoidance. We think it difficult, if not impossible, to maintain this view of the answer, nor do we now see how it could be held good, if it were so regarded.

The material averments of the complaint are, that the defendant, being at the date mentioned engaged in the business of telegraphing for the public, received from the plaintiff for transmission to Chicago a certain message, which, for the purpose of identification, is set out in the complaint, and which, after receiving forty cents, the usual charge, according to its regulations, it failed and refused to transmit.

The gravamen of the complaint is the wrongful or negligent failure of the telegraph company to comply with its duty, whereby it had become liable to the statutory penalty. Apparently, there is but one answer to make to this, and that is to deny it either generally or specially. If the telegram delivered was transmitted, as the law required, or if plaintiff failed to pay or tender payment, according to the regulations of the company, then the averments in the complaint are not true, and an answer which should aver that the telegram was seasonably transmitted, or that payment had not been made or tendered, according to the regulations of the company, would, in our opinion, not be a plea in confession and avoidance.

The answer must be regarded as an attempt, argumentatively, to deny the complaint, and in this we think it comes short.

The exhibits attached to the answer are in no sense the foundation of the defence, and are, therefore, under the well settled rule, no part of it. *Wilson v. Vance*, 55 Ind. 584; *Cassaday v. American Ins. Co.*, 72 Ind. 95; *Barkley v. Mahon*, 95 Ind. 101; *Black v. Richards*, 95 Ind. 184; *Sedg-*

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wick v. Tucker, 90 Ind. 271 ; *Buchanan v. Milligan*, 68 Ind. 118 ; *Schori v. Stephens*, 62 Ind. 441.

The answer must be considered without looking to these, and without these counsel do not attempt to maintain its sufficiency.

Leaving the exhibits out of view, the answer then simply avers that on the 2d day of December, 1882, Chapman sent a message from the defendant's Clifton House office, at Chicago, to Ferris, at Shelbyville, and directed that the answer to it should be left at the Clifton House ; that the message was received by Ferris and answered, and that the answer was seasonably transmitted and delivered to the hotel clerk at the Clifton House. There is not the slightest connection shown, by any averment contained in the answer, between the messages spoken of in the answer and that upon which the defendant's default is predicated in the complaint.

If we are to consider the exhibits attached as part of the answer, it would be difficult to arrive at the conclusion that the message set out in "Exhibit B" was the same as that upon which the complaint is predicated ; that in the complaint is dated "Shelbyville, Ind., Dec. 2d, 1881," and is addressed "Harry C. Chapman ;" that set out in the exhibit is dated "Dec. 2, 1882," without any place being mentioned, and is addressed "Harry C. Chapman." We do not, however, regard this as important, for the reason that we place our ruling distinctly upon the ground that the exhibits are in no sense a part of the answer, and do not in any way aid its averments. Without these there is nothing averred in the answer which shows that the message, upon which its default is predicated in the complaint, was ever transmitted, and so the averment in the complaint, that the defendant "wholly failed and refused to transmit said message," is not denied.

The averment that the plaintiff "did not pay or tender to the defendant any money for the transmission and delivery of said message at the time he filed the same in defendant's office," does not refer to the message mentioned in the com-

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plaint, but to that in "Exhibit B," and this exhibit not being a part of the answer, we can not, without violating well settled rules, look to it to ascertain whether it was the message upon which the complaint is predicated; besides, the averment, as pleaded, is not a denial of that contained in the complaint, which is, in effect, that the plaintiff paid the defendant forty cents, according to its rules and regulations for the transmission of the message.

The judgment is affirmed, with costs.

Filed Sept. 19, 1885.

No. 12,533.

HAMILTON v. THE STATE.

CRIMINAL LAW.—Indictment.—Signing by Prosecuting Attorney.—Printed Signature.—Where the name of the prosecuting attorney, with the title of his office annexed, is printed at the bottom of an indictment with his consent, express or implied, instead of being written, it is a sufficient signing within the meaning of the statute, section 1669, R. S. 1881.

SAME.—Presumption that Prosecutor's Name is Appended to Indictment by Authority.—When the name of the prosecuting attorney is found appended to an indictment, the presumption is that it was so appended by his authority.

SAME.—Quere, whether the failure of the prosecuting attorney to sign an indictment would constitute such a defect as would tend to the prejudice of the substantial rights of the defendant upon the merits of the cause? Section 1756, R. S. 1881.

SAME.—Intoxicating Liquor.—Selling Without License.—Quantity.—"Drink."—Where, in a prosecution for selling intoxicating liquor without a license, in a less quantity than a quart, the evidence shows that the quantity sold was a "drink," and the amount paid for it was ten cents, the jury may find that the quantity sold was less than a quart.

SAME.—Instruction.—Harmless Error.—In such case, an instruction that to a fine the jury might add imprisonment for not less than *twenty* days, instead of *thirty* days, as provided by statute, is not an available error, imprisonment not being added as a part of the punishment.

From the Hancock Circuit Court.

E. Marsh and *W. W. Cook*, for appellant.

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F. T. Hord, Attorney General, and *W. B. Hord*, for the State.

NIBLACK, J.—The indictment in this case, with all the usual and necessary formality, charged the appellant, Hamilton, with having, on the 10th day of January, 1885, sold to one Beard intoxicating liquor, in a less quantity than a quart at a time, to wit, one gill of such liquor, at and for the price and sum of ten cents, without a license to so sell intoxicating liquor. The indictment was a printed blank with the term of court, date, name of appellant, and charging part filled in with a pen, and the name of the prosecuting attorney, with the title of his office annexed, printed at the bottom instead of being written, as is usual in attaching the name of that officer to an indictment.

The appellant moved to quash the indictment upon the ground that the signature of the prosecuting attorney was necessary to its validity, and that the attaching of his name in print was not his signature within the meaning of the statute requiring that an indictment shall be signed by him. But the circuit court overruled the motion to quash, and a jury returned a verdict of guilty, fixing the appellant's punishment at a fine only, upon which a judgment of conviction was rendered.

Error is first assigned upon the refusal of the circuit court to quash the indictment.

Section 1669, R. S. 1881, provides that after an indictment has been found by a grand jury, "it must be signed by the prosecuting attorney," and where an indictment is returned without his signature, section 1670 makes it the duty of the court to require the prosecuting attorney to sign it. Section 240 of the same revision of statutes, which prescribes certain rules for the construction of the statutes of this State, declares that "The words 'written' and 'in writing' shall include printing, lithographing, or other mode of representing

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words and letters. But in all cases where the written signature of any person is required, the proper handwriting of such person, or his mark, shall be intended."

The word "sign," as a verb, has several shades of meaning, and hence a statutory requirement that an instrument in writing, or a pleading, shall be "signed" by some person or officer to make it complete, is much more general and comprehensive than a similar requirement that such an instrument or pleading must be "subscribed" by the person or officer. 3 Parsons Cont., bottom p. 8. On the same principle, the "signing" of a written instrument or pleading by a person or officer has a much broader and more extended meaning than attaching his "written signature" to it implies. When a person attaches his name, or causes it to be attached, to a writing, by any of the known modes of impressing his name upon paper, with the intention of signing it, he is regarded as having "signed" the writing. On that subject Waterman on the Specific Performance of Contracts, at section 240, says: "Where the buyer's name was stated in the commencement, and signed with his initials, it was held sufficient. The signature may be in pencil. And if the party's name be printed or stamped on the memorandum, he intending it at the time as his signature, and affirming it to be such, it will constitute a signing within the requirements of the statute. Thus, where a vendor inserted in a printed invoice, which contained his name, the name of the purchaser, it was held that there was such a ratification and adoption of the printed name as satisfied the statute." See Rapalje & L. Law Dictionary, Title "Sign-Signature;" Fry Spe. Perf. Cont., section 500; Chitty Cont., p. 549; also authorities cited by these authors.

As the prosecuting attorney is required to sign an indictment as a matter of verification merely, there is no reason for enforcing a more rigid rule as to the validity of his signature than in cases of ordinary business transactions, to which the authorities above cited mainly have reference.

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This is plainly inferable from the fact that a prosecuting attorney may appoint a deputy, who, by virtue of his appointment, becomes authorized to sign the name of such prosecuting attorney to indictments, as well as to other pleadings filed, on behalf of the State, in a criminal cause. R. S. 1881, sections 5568, 5569, 5570; *Stout v. State*, 93 Ind. 150. If, therefore, the name of the prosecuting attorney be legibly attached to an indictment by his consent, whether express or implied, it is a sufficient "signing" by him within the meaning of the statute, and when the name of the prosecuting attorney is found appended to an indictment, the presumption is that it was so appended by his authority.

Having reached the conclusion that the indictment in this case was, in legal contemplation, signed by the prosecuting attorney, it becomes irrelevant to inquire whether the signature of that officer is essential to the validity of an indictment upon a motion to quash. It may not be amiss to remark, however, that our cases on that subject, decided under the criminal code of 1852, which, upon the particular point involved, is substantially similar to our present criminal code, are inharmonious, and by no means exhaustive of the point in question. Whether the failure of the prosecuting attorney to sign an indictment would constitute such a defect or imperfection as would tend to the prejudice of the substantial rights of the defendant upon the merits of the cause (R. S. 1881, section 1756) seems never to have been at any time fully considered by this court, and may hence be regarded as still an open question in this State. *Dukes v. State*, 11 Ind. 557; *Heacock v. State*, 42 Ind. 393.

Error is next assigned upon the overruling of the appellant's motion for a new trial, and in that connection it is argued that it was not sufficiently proved that the amount of intoxicating liquor sold, at the time charged, was less than a quart.

Beard, the prosecuting witness, testified that the appellant kept a drug store, and that he bought whiskey of the latter at his drug store, in January, 1885. The prosecuting attor-

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ney then proceeded to interrogate the witness and he to answer as follows: "Question. In what quantity did you get it? Answer. I got a drink. Ques. What was it you drank? Ans. Well, we call it whiskey. Ques. What was it you drank? Ans. I drank whiskey. Ques. If you paid him (the appellant) anything state the amount? Ans. Well, I paid ten cents, or had it charged to me." And this was all the evidence bearing upon the subject of the quantity of intoxicating liquor sold at the time referred to by the witness.

It is true that this court has repeatedly held that an indictment for retailing without a license must charge in unequivocal terms that the quantity of intoxicating liquor sold at the time indicated was less than a quart. *Arbintrode v. State*, 67 Ind. 267 (33 Am. R. 86); *State v. Corll*, 73 Ind. 535.

The cases cited by counsel for the appellant have reference to the sufficiency of an indictment for retailing, and not to the character or weight of the evidence which must be adduced at the trial. One of the cases cited, that is, the case of *Haver v. State*, 17 Ind. 455, was, in any event as we believe, wrongly decided, as the indictment in that case charged that the quantity sold was less than a quart.

It is a matter of regret to us that the prosecuting witness was not more specifically interrogated as to the amount of whiskey purchased by him of the appellant. The jury would not have been justly censurable, if they had failed to find the appellant guilty upon the evidence as it was submitted to them, but we see no reason for holding that the evidence did not, under all the circumstances, fairly tend to prove that the amount of whiskey sold was less than a quart.

Jurors are expected to avail themselves of their experience and observation in the practical affairs of life, in judging of the force as well as the weight of the testimony of witnesses, and, as the whiskey sold in this case was valued at the small sum of ten cents, and constituted only a single drink, we can not say that the jury were not justified in inferring that the quantity purchased by the witness was less than a quart. We are

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seemingly sustained in this view of the evidence by the case of *Feigel v. State*, 85 Ind. 580.

The court instructed the jury that, in the event they found the appellant guilty as charged, they might, in addition to a fine, add imprisonment in the county jail for not less than *twenty* days and not more than six months. This instruction was erroneous, since imprisonment in such a case can not be for a less period than *thirty* days (R. S. 1881, section 5320), and it is claimed that for that reason a new trial ought to have been granted. But, in the first place, the error resulted from a construction of the statute too favorable to the appellant. In the next place, as the jury did not add imprisonment in fixing the punishment, there is nothing upon which to base a claim that the appellant was injured by the mistake in the instruction.

The judgment is affirmed, with costs.

Filed Sept. 23, 1885.

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No. 12,468.

DINWIDDIE v. THE STATE.

CRIMINAL LAW.—Killing Dogs.—Repeal of Statute.—Revivor.—So far as section 2646, R. S. 1881 (enacted in 1852), allowed the killing of all dogs found off the premises of their owners, it was repealed by the act of 1881 (Acts 1881, p. 395), and it was not revived by the repeal of the latter act by the act of 1883 (Acts 1883, p. 148).

SAME.—Act 1883.—When Dogs May Lawfully be Killed.—Under section 5 of the act of 1883 (Acts 1883, p. 149), a dog listed for taxation can not be lawfully killed except while engaged in committing damage to the property of others than its owner, or is known to be a dog that will kill or maim sheep.

SAME.—Value of Dog.—Evidence.—In a prosecution under such statute, the value of the dog, if any, is not material.

SAME.—Exclusion of Evidence.—Error Compensatory.—A party can not make available for the reversal of a judgment the exclusion of evidence, where, upon his objection, like evidence was excluded when offered by the other party

From the Lake Circuit Court.

Dinwiddie v. The State.

W. Johnston, for appellant.

F. T. Hord, Attorney General, *E. D. Crumpacker*, Prosecuting Attorney, and *W. B. Hord*, for the State.

ZOLLARS, J.—Appellant was tried, convicted, and fined ten dollars upon a charge of having mischievously and maliciously killed a dog, owned by the prosecuting witness.

The prosecution is based upon the act of March 7th, 1883 (Acts 1883, p. 148), which is an act to provide for the taxation of dogs, to regulate matters connected therewith, providing penalties for a violation of its provisions, and repealing the act upon the same subject, approved April 13th, 1881. R. S. 1881, section 2647, *et seq.*

A reversal of the judgment is asked upon two grounds. The first is that the trial court erred in not allowing appellant to prove the value of the dog. The second is that the evidence does not show malice on the part of appellant.

There is no controversy about the fact that appellant shot and killed the dog. The theory of his counsel seems to be that he had a right to kill it, because it was upon his premises, and hence off those of its owner. The act of 1852 (R. S. 1881, section 2646) provided as follows: "If the owner of any dog which is in the habit of running from home and wandering about without the presence of its owner, shall neglect or refuse to confine such dog, after due notice given of its wandering habits, it shall be lawful for any person to kill such dog whenever it may be found running about, off the premises and away from the presence of its owner."

The act of 1881 provided that township trustees should furnish to the owners of dogs metallic tags, which the owners should attach to collars to be worn by the dogs. It was the duty of constables, and lawful for any person, to kill any dog running at large without such collar and tag. On the other hand, it was provided that any person who should maliciously injure or kill any dog which had been duly registered, and was wearing such metallic tag, should be guilty of a misde-

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meanor, and fined. There was a proviso, that in all cases, where such dogs were injured or killed while off the premises of their owners, and engaged in committing damage to the property of any other person than that of the owner of such dogs, they might be lawfully killed. R. S. 1881, section 2648, *et seq.*

The act repealed all laws providing for the taxation of dogs, and all laws, or parts of laws, in conflict with its provisions. Acts 1881, p. 397.

So far as the above section in the act of 1852 allowed the killing of all dogs found off the premises of their owners, it must be deemed to have been repealed by the act of 1881, which permitted the killing of dogs wearing the regulation tags only when off the premises of their owners, and engaged in committing damage to the property of persons other than the owners of such dogs.

The act of 1883 dispenses with the tags provided by the act of 1881, and provides for the listing of dogs for taxation. This act provides that any person who shall mischievously or maliciously injure or kill any dog that has been duly listed for taxation, shall be deemed guilty of a misdemeanor, and, upon conviction, shall be fined in any sum not exceeding \$200, to which may be added imprisonment in the county jail for any term not exceeding thirty days. Acts 1883, p. 149, section 5. There is a proviso in this section, that if dogs are injured or killed while engaged in committing damage to the property of persons other than the owners of such dogs, or are known to be dogs that will kill or maim sheep, the provisions of the section shall not apply. Under this act, a dog listed for taxation can not be lawfully killed except while engaged in committing damage to the property of others than its owner, or is known to be a dog that will kill or maim sheep. The repeal of the act of 1881 by the act of 1883 did not revive the above section of the act of 1852, so far as it had been repealed (see R. S. 1881, section 248), and if it had, such revivification would not avail ap-

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pellant, because the act of 1883 is equally in conflict with the act of 1852. Here, there is no controversy about the fact that the dog was properly listed as required by the act of 1883, and the evidence utterly fails to show that when killed it was engaged in committing damage to the property of any one. Nor is there any evidence that the dog was known to be a dog that would kill or maim sheep. There is nothing in the evidence that justifies, or tends to justify, the killing by appellant. The court found that the killing was mischievously and maliciously done. Upon the evidence, that appellant and the prosecuting witness had been engaged in a litigation and entertained hostile feelings toward each other, taken in connection with all the evidence in the case, this court can not, without violating well established rules, overthrow the decision and judgment below, upon the weight of the evidence.

To the contention of appellant that the court below erred in not allowing him to prove the value of the dog, there are two conclusive answers: First. In behalf of the State, there was an offer to prove that the dog was worth \$50. This was objected to by appellant, and the court excluded the evidence. As a part of his defence, appellant offered to prove that the dog was worth \$50, and again the evidence was excluded by the court.

It is settled by the adjudications of this court, that a party can not make available, for the reversal of a judgment, the exclusion of evidence, where, upon his objection, like evidence was excluded when offered by the other party. *Hinton v. Whittaker*, 101 Ind. 344; *Meranda v. Spurlin*, 100 Ind. 380; *Lowe v. Ryan*, 94 Ind. 450. Second. It is not material, under the statute upon which this prosecution is based, what the value of the dog may have been, or that he was of any value.

We are cited by counsel for appellant to the case of *Harness v. State*, 27 Ind. 425, where it was held that the damage occasioned by the injury complained of must be stated in the

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information. That case is not in point, for two reasons: First. Because the prosecution was under another and different statute; and, Second. Because it was held that damage done, and not the value of the animal, was the important thing.

This disposes of the questions made by counsel for appellant, and as we find no error in the record, the judgment is affirmed, with costs.

Filed Sept. 22, 1885.

No. 12,006.

WOLKE v. FLEMING.

CONTRACT.—Presumption.—Contracts, not alleged to be in writing, will be deemed to have been by parol.

SAME.—Lease.—Statute of Frauds.—Consideration.—Where, as part of the consideration of the sale and transfer of a lease for ten years of real estate, the assignee agreed "to assume the covenants, and pay the rent, agreed in said lease," such contract is not a promise to answer for the default of another, within the statute of frauds, but is an independent undertaking, founded upon a new and valuable consideration, for the benefit of a third person, and is valid.

SAME.—Part Performance.—The doctrine of part performance has no application to contracts that can not be performed by either party within a year.

SAME.—Quantum Meruit.—Quantum Valebat.—Where a person has rendered services, or transferred property, under a contract voidable under the statute of frauds, he may recover the value of the services or property under the *quantum meruit* or *quantum valebat*.

SAME.—Possession.—Performance.—Where possession has been given under a contract, and there has been full performance on one side, such contract is not within the statute.

SAME.—Part Performance.—Quere, whether the doctrine of part performance does not apply to leases of real estate, so as to take such contracts out of the statute of frauds.

PLEADING.—Demurrer.—Where the facts pleaded entitle a plaintiff to some relief, the complaint will repel a demurrer.

From the Allen Superior Court.

T. E. Ellison, for appellant.

W. H. Coombs, R. C. Bell and S. L. Morris, for appellee.

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ELLIOTT, J.—On the 25th day of November, 1868, Louis Wolke executed to Robert Lowry a written lease, demising to him real estate in the city of Fort Wayne for the term of ten years. The lease was recorded on the 22d day of February, 1869. Lowry entered into possession and remained in possession until September 17th, 1870, and on that day executed a written assignment to Tucker, Dunn and Henderson. The assignees undertook to perform all of the covenants and conditions of the lease. Subsequently, Tucker assigned his interest in the leasehold to Frank Furste, who assumed the obligations of Tucker. In 1873 Furste sold and transferred to William Fleming his interest in the business conducted on the demised premises, and put Fleming into possession. The latter agreed, as the complaint alleges, “as part of the consideration of such sale and transfer, to assume the covenants, and pay the rent agreed in said lease.” The lease contains a covenant binding the lessees to pay twelve hundred dollars per annum rent for the demised premises. The rent has not been paid since November 25th, 1874, and the premises have been injured by the wrongful act of the tenants in possession. It is not averred that the assignments to Furste or to Fleming were in writing, nor is it averred that the lessees have been in possession of the premises since November 25th, 1874. Fleming, by the purchase of the interest of Furste, became a member of the firm originally composed of Tucker, Dunn and Henderson, but subsequently changed by the withdrawal of Tucker and the admission of Furste. The appellant succeeded by inheritance to the ownership of the real estate demised.

The assignments to Furste and to Henderson are not alleged to be in writing, and they are, therefore, deemed to have been by parol. *Budd v. Kraus*, 79 Ind. 137.

The appellee’s argument prevailed below, and is renewed here. It rests upon these propositions:

First. Fleming’s contract is a promise to answer for the default of another, and is within the statute of frauds.

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Second. The contract of Fleming is within the statute of frauds, because it is one that can not be performed within one year.

Third. An assignment of a lease conveys an interest in real property, and must be in writing.

Of these propositions in their order. The first proposition is assumed with much confidence and the question treated as if it were free from difficulty. We do not share counsel's confidence, for we perceive serious difficulty in the question. Fleming's contract is for the benefit of a third person, and his promise is part of the consideration of the sale and transfer of the leasehold interest to him. It is a promise to a third person, and not to the creditor. There is an express promise to pay the rent, for this is the effect of his assumption of the obligations of his assignor. We have, then, a contract wherein the assignee of a leasehold agrees, as part of the consideration of the sale and transfer of that interest to him, to pay rent to the owner of the fee. It is difficult, if not impossible, to perceive any difference between such a contract and that of a grantee in a deed who assumes to pay an existing encumbrance on the land. Here the party for whose benefit the promise is made stands in relatively the same position as a mortgagee, the consideration of the promise for his benefit is the sale of the leasehold interest to the promisor, and the debt which the latter assumes is part of the purchase-money. It has been many times decided that the assumption by a grantee of the debt of his grantor is not within the statute of frauds. *Josselyn v. Edwards*, 57 Ind. 212; *Campbell v. Patterson*, 58 Ind. 66; *Hoffman v. Risk*, 58 Ind. 113; *Carter v. Zenblin*, 68 Ind. 436; *Davis v. Hardy*, 76 Ind. 272, and authorities cited p. 274; *Rodenbarger v. Bramblett*, 78 Ind. 213; *Dunham v. Craig*, 79 Ind. 117, see p. 122; *Pounds v. Chatham*, 96 Ind. 342.

In *McDill v. Gunn*, 43 Ind. 315, the reasons upon which this doctrine rests are stated, and among the cases cited and approved is that of *Barker v. Bucklin*, 2 Denio, 45. In that

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case the defendant bought a pair of horses of his brother, agreeing as part of the purchase-price to pay a debt of his brother to the plaintiff, and it was held that the contract was not within the statute, the court saying: "Such promise was no more within the statute of frauds than it would have been if the defendant had promised to pay the price of the horses directly to his brother of whom he purchased them."

The case of *Helms v. Kearns*, 40 Ind. 124, declares the same doctrine as the cases cited; the court, in the course of the opinion, saying: "The contract was with the debtor to pay his debt to his creditor. Such a contract, it is well established, is not within the statute of frauds."

In the case of *Fisher v. Wilmoth*, 68 Ind. 449, the point decided appears in this statement of the court: "As to the appellants, the substantial allegations in both paragraphs are, that they, for a valid consideration to them paid, agreed with Manke & Fisher to make certain payments to the plaintiff which they had failed and refused to make. Such promises are not within the statute of frauds, and are hence binding upon parties making them." The court, in another case, said: "Here, the appellant promises the appellee, not that she will pay a debt of a third person to the appellee, but that she will give him certain property and money if he will do a certain act, viz., extinguish the debt due to him from a third person. He executes the contract on his part. It was a valid contract, good between the parties, on good considerations, mutually, and as it was not, on the part of appellant, a promise to pay the debt of another, it was valid, as to her, though not in writing." *Palmer v. Blain*, 55 Ind. 11. In direct line with these cases, and fully maintaining their doctrine, are the cases of *Louisville, etc., R. W. Co. v. Caldwell*, 98 Ind. 245; *Indiana Manfg. Co. v. Porter*, 75 Ind. 428; *Headrick v. Wisheart*, 57 Ind. 129; *Crim v. Fitch*, 53 Ind. 214.

A recent writer says: "The rule adopted in this class of cases is that an agreement to pay and discharge the debt of another made with the debtor or some person on his behalf,

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if founded upon a new and valid consideration, is an independent undertaking, and does not come within the letter or spirit of the statute." Wood Frauds, 197, sec. 125. In support of the text, decisions are cited from nearly all of the courts of the Union. Other treatises upon the statute of frauds lay down the rule substantially in the same terms as those employed by the writer from whom we have quoted. Browne Statute of Frauds (4th ed.), section 166b; Reed Statute of Frauds, section 115.

The case before us falls fully within the principle declared by these authorities, for Fleming promised a third person, upon a new and valuable consideration, to pay Furste's obligation to his creditor. *Anderson v. Spence*, 72 Ind. 315; S. C., 37 Am. R. 162; Wood Frauds, 290. If Fleming had undertaken to pay the rent to Furste, no one would claim that the case was within the statute, and the fact that, instead of promising to pay it to Furste directly, he agreed to pay it to Wolke, the creditor, can not affect the question. So far as the claim for rent is concerned, we deem the complaint good, as against the objection under direct discussion. Whether it is good in so far as it seeks a recovery for injury to the demised premises, is a question not considered or decided.

The second proposition stated presents a different question from that discussed. To parry the force of the appellee's argument upon this proposition, appellant's counsel relies upon the doctrine of part performance, but he leans on a broken reed, for the doctrine of part performance has no application to contracts that can not be performed by either party within a year. Wood Frauds, 492; Reed Statute of Frauds, section 208; 1 Addison Con. (3d Am. ed.) 317, section 212.

Fleming's contract can not, it is evident, be performed within one year, for the rent which he agreed to pay is not due within that period. The intention of the parties, as indicated by their contract, is that the promisor, Fleming, shall not perform his part of the contract within a year. It is the intention that governs. Wood Frauds, 463, and authorities

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cited n. If, however, the contract were conceded to be within the statute, still, there could be a recovery for the value of the consideration actually received, for it is quite well settled that one who has rendered services or transferred property under a contract, voidable under the statute, may recover the value of the services or property, under the *quantum meruit* or the *quantum valebat*. Reed Stat. of Frauds, section 211; Wood Frauds, 434, 435; Browne Stat. of Frauds (4th ed.), section 124; *Arnold v. Stephenson*, 79 Ind. 126, *vide* p. 129; *Stephenson v. Arnold*, 89 Ind. 426; *Landers v. Beck*, 92 Ind. 49, *vide* p. 51.

There are cases holding that the provision of the statute making void contracts that can not be performed within one year has no application to contracts conveying an interest in lands. *Fall v. Hazelrigg*, 45 Ind. 576 (15 Am. R. 278); *Baynes v. Chastain*, 68 Ind. 376. If this be the law, and the appellee is right in asserting that the contract declared on is one conveying an interest in land, his argument upon this point utterly fails. But, leaving out of view this doctrine and proceeding upon grounds where authority is more abundant, we shall find that the law is against him.

The case is not within the statute, for possession has been taken under the contract, and on one side there has been full performance. The author from whom we have already quoted says: "In England, and most of the States of this country, it is held that the statute only applies to contracts which are not to be performed by either side within a year, and therefore where a contract has been completely performed on one side within the year, the case will not be within the statute." Wood Frauds, 494. 1 Addison Con., p. 319, section 312. This is the doctrine of this court. *Houghton v. Houghton*, 14 Ind. 505; *Haugh v. Blythe*, 20 Ind. 24. The rule is a just one, because the party who has fully received all he contracted for should be coerced into doing what he promised. The doctrine is in harmony with the equitable principle that the statute of frauds can not be made the in-

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strument of fraud, and to permit Fleming to acquire and retain all he contracted for and escape liability by interposing the statute as a shield, would be unjust.

There remains for discussion the third proposition. In discussing this appellant's counsel say, that the defence of the statute of frauds is a personal one, and can only be made by a party. This is the general rule. *Dixon v. Duke*, 85 Ind. 434; *Savage v. Lee*, 101 Ind. 514. This general rule, however, does not apply here, for Fleming is a party to the contract.

In the case under examination, the party admitted as one of the joint lessees, entered into possession, and paid rent from September, 1873, until November 25th, 1874. This must be held to create Fleming a tenant in conjunction with his partners, Henderson and Dunn. The agreement under which Fleming entered into possession created a tenancy of some kind, for he did not enter as owner, nor did he enter as a trespasser. The authorities are not in harmony upon this question; they all agree, however, that in cases of this class there is a tenancy, but some of them hold that where a lease is oral and for a longer period than that permitted by the statute, it is void only for the excess; others hold that such a lease creates a tenancy from year to year, and still others that it creates a tenancy at will. Reed Stat. of Frauds, sections 804, 805, 806; Browne Stat. of Frauds, sections 38, 40; Taylor Landlord and Tenant, section 56. This court, in one case, seems to approve the rule that the tenancy is one from year to year. *Schmitz v. Lauferty*, 29 Ind. 400. The tenancy can not, under our statute, be a tenancy at will, since such a tenancy can only be created by an express contract. If it be a tenancy at all, and that it is no one can doubt, it is either a tenancy under the terms of the contract, or, by force of the statute, a tenancy from year to year. The view most favorable to the appellee is that the tenancy is a general one; if a general one, it is a tenancy from year to year, and not determinable without notice. Wood Frauds, 14, 61. A

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tenant from year to year can not, at his pleasure, abandon the demised premises and refuse to pay rent. The landlord has rights as well as his tenant, and the latter's interest or pleasure is not the only thing to be consulted.

It is difficult to conceive any reason why the doctrine of part performance does not apply to a lease. A recent writer, discussing the subject of leases, says: "The principle is well established that agreements carried into execution on one part, where the acts done are performed with a view to the agreement claimed, are not within the statute." Reed Stat. of Frauds, section 808. Many authorities sustain this position, but there is some conflict. *Schmitz v. Lauferty*, *supra*; *Creighton v. Sanders*, 89 Ill. 543.

The point under immediate mention has not been very much discussed by counsel, and we do not make any decision upon it, preferring to leave it undecided until we are aided by a more thorough discussion. It is not necessary that we should decide this question, for the reason that the complaint states facts entitling the appellee to some relief, whatever may be the decision upon this question.

Where the facts pleaded entitle a plaintiff to some relief, the complaint will repel a demurrer. *Bayless v. Glenn*, 72 Ind. 5; *Teal v. Spangler*, 72 Ind. 380; *Lovely v. Speisshoffer*, 85 Ind. 454. The facts stated do entitle the appellant to some relief, and the appellee must answer the complaint.

Judgment reversed, with instructions to overrule the demurrer to the complaint.

ZOLLARS, J., did not participate in the decision of this case.
Filed Sept. 26, 1885.

No. 12,165.

JENNINGS v. FISHER.

TOWN.—*Election of Trustees.—Delay in Filing Certificates of Election by Inspectors.—Filing After Time Limited by Law.—Effect on Acts of Board.—Statute Construed.—Street Improvements.—Cases Overruled and Distinguished.—At a*

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town election for 1881, and also for 1882, held in May of each year, certain persons were elected town trustees, but the certificates of their election were not filed by the inspectors with the clerk of the circuit court until July 9th, 1883, although the statute (section 3309, R. S. 1881) provides that such certificates shall be filed within ten days from the day of the election, and that "no act or ordinance of any board of trustees chosen at such election shall be valid until the provisions of this section are substantially complied with."

Held, that the effect of the filing of the certificates on June 9th, 1883, was to legalize and validate, from their inception, ordinances and contracts for street improvements previously made by the board of trustees of such town, and to authorize the recovery of assessments thereunder. *Dinwiddie v. Board, etc.*, 37 Ind. 66, distinguished, and *Town of Ligonier v. Ackerman*, 46 Ind. 552, and *Pratt v. Luther*, 45 Ind. 250, overruled so far as they conflict with this opinion.

From the Henry Circuit Court.

C. S. Hernly and *S. H. Brown*, for appellant.

J. M. Morris and *C. C. Perdiew*, for appellee.

Howk, J.—This was a suit by the appellant Jennings to recover the amount assessed against a certain lot owned by appellee Fisher for the improvement of Martin street, in the town of Newcastle, in Henry county. The cause was put at issue and tried by the court, and, at the appellee's request, the court made a special finding of the facts, and thereon stated, as its conclusion of law, that the appellant was not entitled to recover. Over appellant's exceptions to its conclusion of law, the court rendered judgment against him for the appellee's costs.

In this court, several errors have been assigned by the appellant, but of these we will consider only the error assigned upon the court's conclusion of law, as it presents the case fairly, as well for the appellee as for the appellant.

The court found the facts of the case to be, in substance, as follows:

"1. That Newcastle is and for twenty years has been an incorporated town, under the statutes of the State of Indiana.

"2. That, at the annual election held on the first Monday

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of the month of May, in the year 1881, Joseph M. Brown, George Brenneman and Simon P. Jennings were chosen to serve for two years, and said Ferris, Pence and Thompson for one year.

"4. That afterwards, at the annual election held on the first Monday in May, 1882, Caleb C. Perdiew, Thomas N. Gronendyke and John F. Thompson were duly elected trustees of said town.

"5. That the inspectors of the town election, for the year 1881, did not file a certificate of the election held that year with the clerk of the Henry Circuit Court, until the 9th day of July, 1883, at which time they also filed the certificate of the election of said town of the year 1882, but they, the persons named above, discharged the duties of their said offices, and were recognized as constituting the board of trustees of said town from the time of the said election held in 1881, until after making the contract hereinafter mentioned.

"6. That, at the meeting of such board of trustees, held on the 6th day of July, 1882, a petition was presented, signed by a majority of all the resident owners of the lots fronting on Martin street, lying between Broad street and the north line of Clay street, in said town of Newcastle, the same being more than one square in length, asking that the same be graded and gravelled and improved under the direction of said board; and that, pursuant to the said petition, the said board passed an ordinance ordering the improvement of said street as prayed for, and, after duly advertising for bids, awarded the contract, which was reduced to writing and signed, for the improvement of the same, to the plaintiff, Levi A. Jennings, upon the following terms, to wit: That the said street was to be graded in accordance with the ordinance establishing the grade, and was to be improved with good, clean, coarse gravel, twelve perch to the rod, eight perch to be put on the street and two perch on each sidewalk, to be evenly spread on the graded surface of said street and sidewalk, the gravel to be ten inches deep in the center of said street, and

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to a point ten feet each side of the center of said street to be five inches deep, and to feather from said points to the edge of the gutters; said work to be done to the satisfaction and acceptance of the board of trustees of said town. The said contractor to be allowed for said work, for cutting seventeen and three-quarters cents per cubic yard, the same to be collected from the property-owners fronting and abutting on said street, except at the street and alley crossings.

"7. That, pursuant to said contract, the plaintiff herein proceeded to do said work, and complied with the contract in all particulars as to the grading, but, as to the gravelling, he did not use the kind required by the contract, but used an inferior quality, the same being mixed with sand and fine gravel.

"8. That the defendant lived upon said Martin street, and saw the said work as it was progressing, and neither objected nor consented thereto.

"9. That, at the time of the letting of said contract and the doing of said work, the defendant herein was the owner of the lot described in the complaint, the same having a frontage of one hundred and thirty-two feet upon said Martin street; and afterwards, to wit, on the 11th day of October, 1882, upon the report of the engineer of said town that the said improvement of said Martin street had been completed between the points named, in accordance with the terms of said contract, the said board accepted the same, and estimated and assessed against the lot of the defendant herein the sum of \$109.56, the same being the proportionate part thereof of the cost of said work, properly assessable against said lot; that the defendant herein has never paid for any part of said improvement, except the sum of three dollars credited to him by the plaintiff herein, for work done upon the said street.

"10. That the assessment against the defendant's lot amounted to eighty-three cents per front foot, and the difference between the value of the work as done by the plaintiff, and what it would have been if done as required by the con-

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tract, amounted to twelve and one-half cents per front foot on each side of said Martin street, making a difference of \$16.50 in favor of defendant herein.

"As a conclusion of law upon the foregoing facts, the court is of the opinion that the plaintiff is not entitled to recover, for the reason that no certificate of the election of the board of trustees was filed in the office of the clerk of the Henry Circuit Court prior to the letting of said contract."

It is manifest that the trial court rested its conclusion of law in this case upon the provisions of section 3309, R. S. 1881, in force since March 10th, 1873. In so far as applicable to this case this section provides as follows: "And it shall be the further duty of such inspectors to make a certified statement, over their own signatures, of the persons elected to fill the several offices in said town, and to file the same with the clerk of the circuit court in the county thereof, within ten days from the day of such election. And no act or ordinance of any board of trustees chosen at such election shall be valid until the provisions of this section are substantially complied with."

The decision of the court below proceeds upon the theory that the action and proceedings of the board of trustees, in relation to the improvement of Martin street, were absolutely void, because, prior to the passage of the ordinance and the letting of the contract for such improvement, the certificates of election of the board of trustees had not been filed with the clerk of the Henry Circuit Court. We are not inclined, however, to adopt this theory. The court found as a fact that the certificates of the town elections for the years 1881 and 1882 were filed by the inspectors of such elections with the clerk of the Henry Circuit Court, on the 9th day of July, 1883. This was more than six months prior to the commencement of this action. Under a fair construction of the statutory provisions above quoted, the effect of such filing of the certificates of the town elections was to legalize and vali-

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date the ordinance of the board of trustees for the improvement of Martin street, from the time of its passage, and the contract of the board with the appellant, for such street improvement, from the time of its execution. The ordinance and contract of the board of trustees were not valid until the certificates of the town elections were filed with the clerk of the Henry Circuit Court; but when such certificates were filed, such ordinance and contract became legal and valid from the time of their inception, and not merely from the date of such filing. This seems to us to be the only just and reasonable construction of the section of the statute we are now considering; and it is manifest that any other construction of the statutory provision quoted than the one here given might, and, perhaps, would prove disastrous in its results, not alone to the town of Newcastle, but to many other incorporated towns within this State.

Upon the point under consideration this case can be easily distinguished from *Dinwiddie v. Board, etc.*, 37 Ind. 66, for in the case cited it appeared that the inspectors of the town election had not, at any time, filed with the clerk of the proper circuit court the certified statement of such election required by the statute. But it must be conceded that the construction we have placed upon the statutory provisions quoted can not well be reconciled with some of the expressions used in the opinions of the court in *Town of Ligonier v. Ackerman*, 46 Ind. 552 (15 Am. R. 323), and *Pratt v. Luther*, 45 Ind. 250. The cases last cited, so far as they may be in conflict with the case in hand, must be regarded as overruled.

Upon the facts specially found, we think the court should have stated as its conclusions of law, that the appellant was entitled to recover the full amount of his assessment against the appellee and his lot, less the sums due the latter for work done and for the difference in value between the material contracted for and that actually used in the construction of the street, with the proper computation of interest.

The judgment is reversed, with costs, and the cause is re-

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manded, with instructions to the court to set aside its conclusion of law, and in lieu thereof to state its conclusion of law in accordance with this opinion, and render judgment accordingly.

Filed Sept. 22, 1885.

No. 12,282.

THE STATE v. ROWE ET AL.

RECOGNIZANCE.—*Forfeiture.*—*Surrender of Principal by Bail before Final Judgment.*—*Constitutional Law.*—*Case Distinguished.*—Section 1718, R. S. 1881, which provides that "The bail, at any time before final judgment against him upon a forfeited recognizance, may surrender his principal in open court or to the sheriff, and, upon payment of such costs as the court may adjudge to be paid by him, may thereupon be discharged from any further liability upon the recognizance," is constitutional. *Butler v. State*, 97 Ind. 373, distinguished.

SAME.—*Remission of Fines and Forfeitures by Governor.*—Section 17, of article 5, of the State Constitution, investing in the Governor "power to remit fines and forfeitures," has reference to fines and forfeitures which have been adjudged, while section 1718 relates to the discharge of liability before judgment.

From the Pike Circuit Court.

F. T. Hord, Attorney General, and *W. B. Hord*, for the State.

MITCHELL, C. J.—The State of Indiana presents a question for our decision involving the constitutionality of section 1718, R. S. 1881.

This section relates to the surrender, by his bail, of one who is under recognizance to answer a criminal charge after forfeiture and before final judgment on such recognizance. It is as follows: "The bail, at any time before final judgment against him upon a forfeited recognizance, may surrender his principal in open court or to the sheriff, and, upon payment of such costs as the court may adjudge to be paid by him, may thereupon be discharged from any further liability upon the recognizance."

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Rowe had been recognized by a justice of the peace to appear at an ensuing term of the Pike Circuit Court to answer a criminal charge. Failing to appear, his recognizance was forfeited, as well against himself as against his bail. Subsequently, he was taken in custody by his bail and produced in open court and surrendered pursuant to the provisions of the statute above set out. The court thereupon adjudged against them the payment of the costs occasioned by the forfeiture of the recognizance, the clerk's, sheriff's and prosecuting attorney's costs, and the costs in the civil suits pending for the collection of the recognizance, and upon showing that such costs had been paid, an order was entered discharging them from further liability on the recognizance. •

In a suit to recover upon the forfeited recognizance, it was held as a conclusion of law upon the facts found, that the discharge so adjudged was valid and effectual as to the bail, and from this judgment the State appeals.

The contention on behalf of the State is that the discharge by the court is in effect the remission of a forfeiture, and that under section 17 of article 5 of the Constitution of the State of Indiana, the Governor is invested with the exclusive "power to remit fines and forfeitures," and that, therefore, the section above set out is inoperative and void, as being an attempt to invest the judicial with power exclusively committed to the executive department of the government.

The case of *Butler v. State*, 97 Ind. 373, is relied on as being conclusive of the question. In that case, the validity of section 1888, R. S. 1881, which authorizes this court in certain criminal cases to suspend the execution of sentence, pending an appeal, was the only question directly involved. It was there held that the suspension of sentence was in effect a respite or reprieve, and that the power to grant reprieves was by the Constitution exclusively committed to the executive, and that, being so committed, the Legislature could not confer it upon the court.

Incidentally, it was said by the learned judge who wrote

the opinion, that section 1724, under which it had been held in *State v. Shideler*, 51 Ind. 64, and *State, ex rel., v. Speck*, 20 Ind. 211, that a forfeiture in a proper case might be remitted by the court, was obnoxious to the same objection as section 1888, and the ruling in the cases above cited was disapproved.

If we should concede that what was said in respect of the power of the court, under section 1724, was properly in the line of the case there in judgment, it nevertheless does not affect the question with which we are here concerned.

That section relates to the remission of a forfeiture after judgment on the forfeited recognizance; the one here in question concerns the manner in which recognizers may satisfy and discharge the recognizance after forfeiture and before final judgment.

That it is competent for the Legislature to prescribe terms or conditions upon which the court may adjudge a satisfaction of, or discharge from, a forfeited recognizance, we have no doubt. In the supposition of law, the principal is in the custody of his bail from the time recognizance is entered, and they are responsible for his appearance until discharged according to law. The recognizance is designed as a means of compelling the principal's appearance for trial, and for his submission, if found guilty, to the punishment which the law ordains for the offence for which he has been put under recognizance. The theory of the law is that although the principal has escaped from the custody of his bail, so that he can not produce him in discharge of his recognizance according to its terms, yet, inasmuch as the State prefers that the criminal should be surrendered for trial and punishment rather than that the penalty of the forfeited bond should be paid into the public treasury, it says, in effect, produce the criminal in open court at any time before final judgment, pay such costs as the court may adjudge, and this shall be accepted in discharge of the bond.

The sense in which the Governor may be authorized to "remit fines and forfeitures," is that he may release or absolve

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the person against whom a fine or forfeiture has been adjudged, from its payment after judgment. The statute here in question does not provide for absolution from an adjudged forfeiture. The import of it is that until a final judgment has been pronounced recognizors may discharge the liability incurred by the escape of their principal by re-taking and surrendering him in the manner prescribed, and paying the adjudged costs.

There was no error in the judgment of the circuit court, and it is accordingly affirmed.

Filed Sept. 22, 1885.

No. 12,357.

ROSENFELD v. THE PEORIA, DECATUR AND EVANSVILLE
RAILWAY COMPANY.

COMMON CARRIER.—*Railroad.—Contract Limiting Liability.—Negligence.—*

Fraud.—A common carrier may, by contract, limit his liability as an insurer, but he can not thus relieve himself from the consequences of his own negligence or fraud.

SAME.—*Fixing Value of Goods by Carrier.—When Binding upon Shipper.—*

Burden of Proof.—In order that a common carrier may, by fixing the value of goods received for transportation, limit his liability, he must show that the shipper had knowledge of such fixing of value and for a sufficient consideration consented thereto, or that his statements and conduct justified the carrier in so fixing the value.

SAME.—*Bill of Lading.—Stipulation as to Measure of Liability.—Arbitrary Fixing of Value by Carrier.*—Where it is expressly stipulated in a bill of lading that "in the event of loss or damage under the provisions of this agreement, the value or cost at the point of shipment shall govern the settlement of the same," the insertion by the carrier, without the knowledge or consent of the shipper, of almost illegible abbreviations which are interpreted by the carrier to mean "Leaks and outs excepted, \$20 railroad valuation," will not bind the shipper, and he may recover the actual value of the goods at the point of shipment.

From the Vanderburgh Superior Court.

C. L. Wedding, for appellant.

C. Denby and D. B. Kumler, for appellee.

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ZOLLARS, J.—Appellant delivered to appellee a barrel of whiskey to be transported and delivered to James O'Brien at Litchfield, Illinois. It was never delivered, and appellant brought this action to recover its value. When it was delivered to appellee, appellant received from its agents a bill of lading. In that, there is a statement of the name and residence of the consignee, and a description of the article as "1 b'll whiskey, of 400 pounds weight." Following these statements there is a blank, followed by printed stipulations, one of which reads thus: "In the event of loss or damage under the provisions of this agreement, the value or cost at the point of shipment shall govern the settlement of the same." In the blank there are letters and figures which witnesses say are "L. & O. Ex. \$20 R. R. val.," but they are so run together, and illegible, that it would be impossible for any one, not knowing for what they were intended, to decipher them all. The interpretation of these characters, as given by the agents of the railway company is, "Leaks and outs excepted, \$20 railroad valuation."

The contention in behalf of the railway company is, that because of those characters in the bill of lading, appellant is limited in his recovery to \$20 and the interest on that amount from the time the whiskey should have been delivered. The court below adopted this theory, rendered judgment for the appellant for \$21.40, although the barrel of whiskey was shown to have been worth \$96.

On the other hand, appellant contends that the printed stipulations as to the amount of recovery should control, and that if the characters in the blank space, with the interpretation given them by witness, should be regarded as a part of the contract, it would be such a contract as the courts should not uphold. Thus we have the questions presented by the argument of counsel:

First. Can a railway company make and enforce a contract limiting the amount of recovery against it for the loss of articles received by it for transportation, as a common carrier?

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Second. Do the characters in the blank in any way have the force and effect of a contract binding upon appellant?

These in their order: It is the settled law of this State, abundantly supported by authority and reason, that while common carriers may, by contract, limit their liability as insurers, they can not, by contract, relieve themselves from the consequences of their own negligence or fraud. The law will not allow a common carrier to contract to be safely negligent or dishonest. *Michigan Southern, etc., R. R. Co. v. Heaton*, 37 Ind. 448 (10 Am. R. 89); *Ohio, etc., R. W. Co. v. Selby*, 47 Ind. 471 (17 Am. R. 719); *St. Louis, etc., R. W. Co. v. Smuck*, 49 Ind. 302; *Adams Express Co. v. Fendrick*, 38 Ind. 150; *Indianapolis, etc., R. R. Co. v. Allen*, 31 Ind. 394. See *Lawson Contracts of Carriers*, p. 31, *et seq.*, and the numerous cases there cited.

In the case of *Railroad Co. v. Lockwood*, 17 Wall. 357, after holding that common carriers can not contract against their liability for negligence, the court reached the following conclusions:

“*First.* That a common carrier can not lawfully stipulate for exemption from responsibility when such exemption is not just and reasonable in the eye of the law.

“*Secondly.* That it is not just and reasonable in the eye of the law for a common carrier to stipulate for exemption from responsibility for the negligence of himself or his servants.”

Under these rules, and the elaborate reasoning upon which they are based, may common carriers arbitrarily, or by contract, place a value upon articles received for carriage, and in this way limit the amount of recovery against them in case of loss? If they may contract against all liability for loss by means other than their own negligence or fraud, of course they may contract for the amount of recovery in such cases. But in case of a loss through their negligence or fraud, the same reasons, at first view, would seem to exist against contracts limiting the amount of recovery as exist against contracts for total exemption; and hence some of the courts have

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held such contracts invalid. *Kansas City, etc., R. R. Co. v. Simpson*, 30 Kan. 645 (46 Am. R. 104); *United States Ex. Co. v. Backman*, 28 Ohio St. 144; *Black v. Goodrich Trans. Co.*, 55 Wis. 319 (42 Am. R. 713); *Moulton v. St. Paul, etc., R. W. Co.*, 31 Minn. 85 (47 Am. R. 781).

If, without any representation of value by the shipper, or a request of him for a statement of value, and without notice and contract, and a valuable consideration, the carrier should place a value upon the articles received for carriage, that would not bind the shipper. In such case, he would clearly have the right to recover the full value of the articles lost by the carrier.

If, on the other hand, for the purpose of getting reduced rates, the shipper should place a value upon the articles for carriage, or if by any kind of artifice he should induce the carrier to place a lower value upon the articles, and thus get reduced rates, it seems to be settled by the weight of authority that he could not recover beyond the value so fixed by him, or the value which by deceit he caused the carrier to fix. To hold otherwise would be to enable the shipper to take advantage of his own wrong.

Carriers have the right to fix their charges according to the value of the article to be carried. The greater the value the greater the responsibility and liability in case of loss. For assuming these, the carrier is entitled to charge increased compensation. *Lawson Cont. of Carriers*, pp. 88, 89, and cases there cited.

If the shipper may, by false statements or artifice, deceive the carrier as to value, and thus get lower rates, and still recover from the carrier the full value, he is enabled to consummate a wrong upon the carrier which should not be sustained by the courts. *Graves v. Lake Shore, etc., R. R. Co.*, 137 Mass. 33 (50 Am. R. 282); *Hart v. Pennsylvania R. R. Co.*, 112 U. S. 331.

To hold the carrier liable in such a case for the full value of the article beyond the representation of the shipper, would

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seem to be neither just nor reasonable; and if neither just nor reasonable, such a holding is not demanded by any considerations of public policy. This limited liability is not regarded as in conflict with the general rule, that common carriers can not by contract limit their liability for loss occurring through their negligence, but as an exception to it. 2 Greenl. Ev., section 215; Lawson Cont. of Carriers, p. 87, and cases there cited; Story Bailments, sections 565, 567; *Cole v. Goodwin*, 19 Wend. 251.

Another rule of law, that seems to be settled by the weight of authority, is that if the carrier claims that, by contract or the misconduct of the shipper, his common law liability has been limited, the burden is upon him to clearly show it, and all such contracts will be interpreted most strictly against the carrier.

In the case of *St. Louis, etc., R. W. Co. v. Smuck*, *supra*, this court said: "But, in our opinion, contracts not clear in their meaning, by which common carriers seek to avoid the responsibility which the law imposes upon them as such, should be construed most strongly against them." *Indianapolis, etc., R. R. Co. v. Cox*, 29 Ind. 360; Lawson Contracts of Common Carriers, sections 135, 246, and cases there cited. And so, too, that carriers may, by fixing value, limit this common law liability, it must be shown that the shipper had some kind of knowledge of such fixing of value, and for a sufficient consideration consented thereto, or that his statements or conduct justified the carrier in so fixing the value, as we have before stated.

Tested by these rules of the law, how stands the case before us? As we have seen, there is an express and definite stipulation in the bill of lading, that in case of loss, the value or cost at the point of shipment shall measure the amount of the recovery. To overthrow this specific stipulation, appellee relies upon the figures and letters in the blank, which, as we have seen, are so written that no one could read or in-

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interpret them, unless he had previous knowledge of their import. Schouler Bail. Including Carriers, p. 468. We think that it would not be reasonable to hold that these shall overthrow the express and plainly printed stipulation above referred to, and that the only proper and reasonable construction of the contract is, that it fixes the amount of recovery in case of loss at the value of the barrel of whiskey at the point of shipment.

The evidence shows that the agents of appellee put the letters and figures upon the bill of lading without the knowledge or consent of appellant. He had no understanding or knowledge of their import, except what they of themselves import, and that was practically nothing. He made no representations as to the value of the barrel of whiskey, nor was he asked to make any.

The testimony by the agents of appellee tends to show that less freight was charged than would have been charged had the value been stated at a greater amount; but there is no evidence that appellant was a party to such an arrangement, nor that he had any knowledge of it. There is evidence that he had accepted several like bills of lading for barrels of whiskey shipped, but they of themselves would not furnish any information that the carrier, by such letters and figures, was limiting its liability, first, because the figures and letters could not be intelligently deciphered by the shipper, and second, if they could, they would not be sufficient to overthrow and destroy the plainly printed stipulation that the damages should be measured by the value at the point of shipment. We do not regard this as a case to be settled upon a conflict of the evidence, but as a case where there is no evidence at all to bind the shipper to the value so fixed by the carrier. For these reasons, we think that the judgment should be reversed. Other questions are discussed by counsel, but it does not seem necessary that we shall now decide them.

The judgment is reversed with costs, with instructions to

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the court below to sustain appellant's motion for a new trial, and proceed in accordance with this opinion.

Filed Sept. 24, 1885.

No. 12,430.

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WOODWARD v. THE STATE.

CRIMINAL LAW.—Embezzlement.—Indictment.—Lottery Ticket.—Basis of Prosecution.—An indictment for embezzlement, charging that the defendant was the agent and employee of a certain person "for the purpose of collecting money on a certain lottery ticket," and then properly charging the embezzlement of such money, but not more particularly describing the lottery ticket, is sufficient on motions to quash and in arrest of judgment, as such ticket is not the basis of the prosecution.

SAME.—Embezzling Money Collected on Lottery Ticket.—Defence.—In such case, it is no defence to the charge of embezzlement that the money feloniously converted was collected on a lottery ticket issued in the transaction of an unlawful business.

SAME.—Indictment.—Certainty.—Under section 1755, R. S. 1881, the indictment is sufficient if the offence charged is stated with such a degree of certainty that the court may pronounce judgment, upon a conviction, according to the right of the case.

From the Marion Criminal Court.

J. L. Mitchell and *N. C. Carter*, for appellant.

F. T. Hord, Attorney General, and *W. B. Hord*, for the State.

HOWK, J.—The appellant, Woodward, was indicted, tried and convicted for the crime of embezzlement, as charged in the second count of the indictment against him. From the judgment of conviction he has appealed to this court, and the only errors assigned by him here are such as call in question the sufficiency of the facts stated in the second count of the indictment to constitute a public offence, before as well as after verdict. The evidence is not in the record.

In the second count of the indictment it is charged "that John T. Woodward, on the 17th day of November, A. D.

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1884, at and in the county of Marion and State of Indiana, was then and there the agent and employee of Jeremiah Miller for the purpose of collecting money on a certain lottery ticket, then and there, and by virtue and on account of such agency and employment by the said Jeremiah Miller, for the purpose aforesaid, he, the said John T. Woodward, as such agent and employee, at and in the county and State aforesaid, did then and there receive and take into his possession divers moneys, bills, notes, United States treasury notes, national bank notes, gold and silver coins, nickel and copper coins, current money of the United States, amounting in all to twelve hundred dollars, and of the value of twelve hundred dollars; a more particular and accurate description of said moneys, bills, notes, United States treasury notes, national bank notes, gold and silver coins, nickel and copper coins is to the said jurors unknown, and can not be given for the reason that they are in the possession of some person or persons to said jurors unknown; said moneys, bills, notes, United States treasury notes, national bank notes, gold and silver coins, nickel and copper coins, then and there being the moneys, personal goods and chattels of Jeremiah Miller; and he, the said Woodward, on the day and year aforesaid, at and in the county and State aforesaid, did then and there unlawfully, feloniously, purposely, knowingly and fraudulently purloin, secrete, embezzle and appropriate to his own use all of said moneys, personal goods and chattels aforesaid, with intent then and there and thereby to defraud him, the said Miller, out of said moneys, personal goods and chattels, contrary to the form of the statute," etc.

It is manifest that it was the intention of the State, in and by this second count of the indictment against the appellant, John T. Woodward, to charge him with the commission of the crime of embezzlement, as the same is defined and its punishment prescribed in section 1944, R. S. 1881, in force since September 19th, 1881. In this section it is provided as follows:

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"Every officer, agent, attorney, clerk, servant, or employee of any person or persons, or corporation or association, who, having access to, control, or possession of any money, article, or thing of value, to the possession of which his or her employer or employers is or are entitled, shall, while in such employment, take, purloin, secrete, or in any way whatever appropriate to his or her own use, or to the use of others, or knowingly permit any other person to take, purloin, secrete, or in any way appropriate to his or her own use, or to the use of others, any money, coin, bills, notes, credits, choses in action, or other property or article of value, belonging to or deposited with, or held by such person or persons, or corporation or association, in whose employment said officer, agent, attorney, clerk, servant, or employee may be, shall be deemed guilty of embezzlement, and, upon conviction thereof, shall be imprisoned in the State prison for not more than fourteen years nor less than two years, fined in any sum not more than one thousand dollars nor less than one dollar, and disfranchised and rendered incapable of holding any office of trust or profit for any determinate period."

In section 1759, R. S. 1881, of the criminal code, in force since September 19th, 1881, it is provided as follows: "The defendant may move to quash the indictment or information when it appears upon the face thereof, either — * * *

"*Second.* That the facts stated in the indictment or information do not constitute a public offence. * * *

"*Fourth.* That the indictment or information does not state the offence with sufficient certainty."

Upon these two statutory grounds of objection, the appellant's counsel earnestly insist that the criminal court erred in overruling both the motion to quash the second count of the indictment and the motion in arrest of judgment. The question for our decision is this: Does the second count of the indictment state sufficient facts, with sufficient certainty, to constitute a public offence? As bearing upon the question of

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certainty, section 1756, R. S. 1881, of the criminal code, provides as follows: "No indictment or information shall be deemed invalid, nor shall the same be set aside or quashed, nor shall the trial, judgment, or other proceeding be stayed, arrested, or in any manner affected, for any of the following defects: * * * *

"*Sixth.* For any surplusage or repugnant allegation, when there is sufficient matter alleged to indicate the crime and person charged. * * *

"*Tenth.* For any other defect or imperfection which does not tend to the prejudice of the substantial rights of the defendant upon the merits."

As to the degree of certainty which is required in criminal pleading by our code, section 1755, R. S. 1881, provides as follows: "The indictment or information is sufficient, if it can be understood therefrom— * * *

"*Fifth.* That the offence charged is stated with such a degree of certainty that the court may pronounce judgment, upon a conviction, according to the right of the case."

The chief objection urged by appellant's counsel, in argument, to the second count of the indictment in this case, upon the ground of its uncertainty, is, that it contains no certain or definite description of the lottery ticket mentioned therein. Of this objection, counsel say: "This count charges that the appellant was, at a certain time, the 'agent and employee of Jeremiah Miller, for the purpose of collecting money on a certain lottery ticket.' What lottery ticket? No number was given, and no reason was assigned for not giving the number. Neither is it stated upon what lottery scheme the ticket was drawn, nor what lottery issued the ticket, whether the Louisiana, Louisville or Vincennes lottery. Nor does it state whether Miller was the owner or holder of the ticket, or to whom it belonged; nor is there any reason given why these facts, as to the number of the ticket and the name of the lottery issuing it, are not set out in the indictment." Ap-

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pellant's counsel then quote from Bicknell's Crim. Prac., p. 83, as follows: "The indictment, or information, must be such that the defendant may know exactly what he is to answer, and that the record may show for what he has been put in jeopardy. The act, or instrument, or both, constituting the basis of a prosecution, should be described with certainty, or if not, the impossibility of so describing it, should be stated, as an excuse for the want of certainty." *Whitney v. State*, 10 Ind. 404.

It may be conceded that the rules of criminal pleading and practice, in this State, are correctly stated by Judge Bicknell, in his excellent treatise on Criminal Practice; but those rules, we think, can have no possible application to the second count of the indictment, in the case at bar, in so far as the description of the lottery ticket therein mentioned is concerned. It can not be said, with the slightest degree of legal accuracy, that the criminal charge against the appellant, in such second count, is predicated upon the lottery ticket mentioned therein, or that such lottery ticket constitutes the basis of this prosecution. If the felonious act, charged against the appellant, had immediate connection with the lottery ticket, or if it were something unlawfully done by him of or concerning such ticket, then the rules of criminal pleading, invoked by appellant, would be applicable, and it might well be held that the ticket should be described with certainty.

In the case in hand, the reference to the lottery ticket in the second count of the indictment was manifestly made for the purpose of indicating how the appellant, as the agent and employee of Jeremiah Miller, had access to, control and possession of the money of Miller, which, it was charged, he had feloniously embezzled and appropriated to his own use. No criminal act was charged against the appellant, in the second count, in connection with the lottery ticket, and therefore it was not necessary, we think, that such ticket should be described with certainty. Besides, as we have seen, un-

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der section 1755 of our criminal code, the indictment is sufficient if the offence charged is stated with such a degree of certainty that the court may pronounce judgment, upon a conviction, according to the right of the case. In the case before us, it can not be doubted, as it seems to us, that the offence of embezzlement is stated in the second count of the indictment with such a degree of certainty that the court could, as it did, upon the conviction of the appellant, pronounce the right judgment.

It is further claimed by appellant's counsel that the second count of the indictment was bad, both on the motion to quash and the motion in arrest, because the moneys of Miller, which were the subject of the embezzlement charged, were shown to have been collected on a lottery ticket, and, as lotteries were prohibited by the laws of this State, were derived from an illegal source. This position can not be maintained, we think, under the decisions of this court. *United States Express Co. v. Lucas*, 36 Ind. 361; *Rothrock v. Perkinson*, 61 Ind. 39; *State v. Tumey*, 81 Ind. 559. In the case last cited, the opinion of the court concludes as follows: "In such a case, it seems to us that the fact, if it were the fact, that the appellee received such money, as such agent, for his principal, the association, upon an illegal consideration, and in the transaction of an unlawful business, did not constitute any valid or sufficient defence to him, the appellee, in this prosecution against him for his alleged embezzlement of such money."

We conclude, therefore, that the criminal court committed no error in this case, in overruling either appellant's motion to quash the second count of the indictment, or his motion in arrest of judgment.

The judgment is affirmed, with costs.

Filed Sept. 24, 1885.

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No. 12,296.

BROW v. THE STATE.

CRIMINAL LAW.—*Selling Intoxicating Liquor to Intoxicated Person.*—*Indictment.*—*Quantity.*—Under section 2092, R. S. 1881, an indictment charging a sale of intoxicating liquor to a person who is in a state of intoxication is not bad because it fails to specify the quantity of liquor so sold.

SAME.—*Excuse for Sale is Matter of Defence.*—If a sufficient excuse existed for making such sale, it is a matter of defence.

SAME.—*Knowledge of Intoxication.*—*Evidence.*—*Presumption.*—*Practice.*—In such case, when the State proves the sale, and that the purchaser was at the time in a state of intoxication, the case is *prima facie* made out, without showing that the defendant knew the purchaser was intoxicated, as the law will presume that he did know it.

SAME.—*Notice.*—Persons entrusted with the sale^a of intoxicating liquor must take notice of the condition of those who apply for it.

SAME.—*Evidence.*—For the purpose of fixing the time of the sale and to show the condition of the prosecuting witness, it is not error to allow him to testify that he lost his money on the occasion of the sale.

SAME.—*Misconduct of Counsel in Argument.*—Where, in a prosecution for selling intoxicating liquor to a person in a state of intoxication, the prosecuting attorney, in addressing the jury, states, among other remarks of doubtful propriety, that "he knew personally the saloon-keeper in this case, and that he was guilty of this, and he was sure of other crimes," it is error for the court, upon request, to fail to instruct the jury to disregard such improper remarks.

From the Benton Circuit Court.

J. T. Brown and *G. H. Stewart*, for appellant.

M. H. Walker, Prosecuting Attorney, and *I. H. Phares*, for the State.

MITCHELL, C. J.—The first question presented in this record relates to the sufficiency of the indictment. This charges that the defendant did, on a day named, "unlawfully sell to one Freeland G. Tubbs, knowing him to be in a state of intoxication, a certain intoxicating liquor, at and for the price of ten cents, he, the said Freeland G. Tubbs, being then and there, at the time said intoxicating liquor was sold to him as aforesaid, in a state of intoxication."

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The insistence of the appellant is that the indictment is fatally defective, because it fails to charge the quantity of liquor sold, and that it was less than a quart.

Section 2092, R. S. 1881, makes it an offence to sell, barter or give away any intoxicating liquor to any person who is in a state of intoxication, by any one knowing him to be in a state of intoxication.

The offence is *prima facie* complete under this statute, when any quantity of intoxicating liquor is sold to an intoxicated person by another, who knows him to be at the time in a state of intoxication.

It does not follow that such person may not lawfully purchase intoxicating liquor, even from a person who knows of his intoxicated condition, provided the sale is made in *good faith* and for a lawful purpose. An intoxicated person might purchase intoxicating liquor for medicinal or mechanical purposes, and if lawfully sold to him for such purposes this might, in a proper case, be a defence; but as all such sales are in apparent violation of the law, the excuse for making them must be shown by the defendant, and that it was excusable need not be negatived in the indictment. *Payne v. State*, 74 Ind. 203.

It is next argued that the verdict is not sustained by the evidence. All that can be said at this point is that the evidence is conflicting. That the prosecuting witness Tubbs was intoxicated nobody denies; that he was for hours, and until a late hour at night, in the appellant's saloon, is not denied. He testified unequivocally that he purchased during his stay eight or ten drinks of whiskey, which he says he drank in the saloon. Some of it, he affirms, was purchased from the defendant, and some from his clerk.

Both the defendant and his clerk deny having sold him any. Both testify that they refused to sell him. Others testify, among them the sheriff of the county and his deputy, that they were present part of the time and saw and heard the proprietor refuse to sell to him. Yet the jury, under proper

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instructions, found against the defendant. There was evidence to support the finding.

Counsel for appellant argue that the State offered no evidence to show that the defendant knew that the prosecuting witness was intoxicated. It was not necessary. When the State proved the sale, and that the purchaser was at the time in a state of intoxication, the case was *prima facie* made out. When the fact of intoxication is shown, the law will presume the seller knew it. Whether an individual is in a state of intoxication or not, is a fact ordinarily open to the perception of others, and persons entrusted with the sale of intoxicating liquor must take notice of the condition of those who apply for it. If the degree of intoxication should be so slight as not to be noticeable by the seller, or if, on account of concealment, deception, or any other peculiarity, in any case, it should escape detection, although reasonable care was exercised, it would be a legitimate defence to make such facts appear. *Goetz v. State*, 41 Ind. 162. Besides, the defence in this case was not rested on the ground of the defendant's want of knowledge, but upon the ground that no sale was made, impliedly, at least, for the reason that the prosecuting witness was known to be intoxicated.

There was no error in the refusal of the court to instruct as requested by the defendant, that the State must prove beyond a reasonable doubt that the defendant knew the prosecuting witness was in a state of intoxication at the time of the sale. The instruction was not correct as an abstract proposition, nor was there any evidence to which it was applicable. Moreover, the instructions given are not in the record, and for that reason no question is presented in respect of that complained of. For the purpose for which it was avowedly offered, there was no error in admitting the testimony of the prosecuting witness, to the effect that he lost his money on the occasion of the sale. It was offered for the purpose of fixing the time, and to show the condition of the witness.

A bill of exceptions in the record discloses that during the

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closing argument, an exception was taken by the defendant to the action of the court in refusing, on his motion, to instruct the jury to disregard certain remarks made by the prosecuting attorney in his address to the jury. The statements objected to and the exception are stated as follows: "That saloon-keepers always had a gang organized to swear them through, and that the jury should not believe a saloon-keeper under oath; that only a short time ago a saloon-keeper had sold liquor to a man and made him drunk, and he froze to death; that all saloon-keepers were alike, and that they would swear to lies; that he knew personally the saloon-keeper in this case, and that he was guilty of this, and he was sure of other crimes; that juries were too much in the habit of letting rum-sellers go, and this thing must stop; that only a short time ago a saloon-keeper down in Otterbein, in this very county, sold liquor to a man, and he froze to death, and if the defendant was acquitted, he would go and do the same thing." Defendant, by his counsel, thereupon objected to all of such statements, and defendant moved the court to restrain counsel, and that the jury be instructed to disregard such remarks, but the court passed the objection without ruling thereon, to which action of the court the defendant at the time excepted. These remarks and the action of the court thereon were set out in the written evidence, and assigned as one of the grounds for a new trial.

Whatever may be said concerning the propriety of so much of the foregoing speech as refers to persons engaged in like business with that of the defendant, as a class, or of the reference to the case where liquor had been sold to a man who became drunk and was afterwards frozen to death, that part of it in which the State's attorney said "that he knew personally the saloon-keeper in this case, and that he was guilty of this, and he was sure of other crimes," was such a palpable abuse of the privilege of counsel as, without a disregard of all rules governing the fair administration of justice, can not be excused.

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The defendant, as was his right, contested the question of his guilt. In this contest, it was incumbent on the State to establish its accusation against him by evidence admitted through the legitimate channel. It had no right to ask for a conviction upon assertion, or evidence from any source not thus admitted. Upon the evidence as it stood, it was not only a fair question of debate, but a question for fair debate, whether the defendant's guilt was made out, and it was in the highest degree unfair that the attorney for the State put the weight of his own personal knowledge into the scale, in the manner set forth, to overbalance the defendant's case.

The Constitution guarantees to every person accused of crime the right to meet the witnesses against him "face to face," but this guaranty stands for nothing, if, after the evidence is closed, the State may avail itself of the personal knowledge of the prosecutor concerning the defendant's guilt, not only of that but other crimes, conveyed to the jury, accompanied with other statements, ingeniously contrived to excite their prejudice against him. If a conviction is had, in any case, it is essential that it shall have been secured according to the facts in the case legally produced to the jury, agreeable to established rules in judicial proceedings, and not by methods which afford the accused no opportunity of meeting the assertions made by any one claiming to have personal knowledge of his character or guilt.

From the brief of the prosecutor, which lies before us, we are convinced that his experience, learning and ability are such that a resort to the methods employed in this case is entirely unnecessary to enable him to discharge the duties of his high office efficiently, with a jealous regard for the rights of the State, and yet with due respect for the rules of law. This fact renders the abuse of his privilege, as it appears in this case, all the more inexcusable.

The application of the rule is not, as he forcibly argues, an abridgment of the right of the prosecutor to discuss the merits of the State's case, but it is necessary, in order to preserve

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the rules regulating the conduct of trial in courts of justice, and the benefit of an impartial trial by jury to the accused. With the preservation of these rules and the maintenance of this right, the courts and their officers are charged, and it must be insisted upon that they be not violated.

For the error of the court in failing to instruct the jury to disregard the improper remarks of counsel, this cause is reversed.

Filed Sept. 23, 1885.

No. 12,077.

NAFE v. LEITER.

SUPREME COURT.—Practice.—Cause for New Trial.—Assignment of Error.—

A ruling upon a motion to quash a writ of replevin is not a cause for a new trial, and, to present a question as to such ruling to the Supreme Court, an independent assignment of error is necessary.

STATUTORY PROCEEDINGS.—Strict Compliance with Statute Necessary.—In all statutory proceedings, *ex parte* in their character, a strict compliance with the substantial provisions of the statute is necessary to the validity of such proceedings.

ANIMALS.—Running at Large, etc.—Impounding.—Burden of Proof.—Under section 2639, R. S. 1881, one who has taken up and seeks to detain animals until certain alleged charges are paid, must show affirmatively that, at the time he took up and impounded such animals, they were running at large or pasturing upon *uninclosed* lands or public commons of the township.

SAME.—Compensation.—Partially Inclosed Land.—One who takes up and impounds animals found running at large in his pasture only, which is partially inclosed, is not entitled to compensation.

From the Fulton Circuit Court.

J. W. Rickel and E. Myers, for appellant.

M. L. Essick, G. W. Holman and O. F. Montgomery, for appellee.

NIBLACK, J.—On, and previous to, the 27th day of May, 1884, Jacob Leiter and James H. Nafe were the owners of,

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and resided upon, adjoining farms in Rochester township of Fulton county, in this State. Leiter was, at the time, the owner of a lot of hogs, consisting of five sows and forty-five shoats. On the morning of the day named, Leiter fed his hogs in an open lot on his farm, which communicated with adjoining lands. About ten o'clock of the same day, Nafe found the hogs in his pasture, which constituted a partially inclosed part of his farm, and took them up and impounded them in a lot upon his farm. On the same afternoon, Nafe sent a written notice of the taking up and impounding of the hogs to Leiter, who, before the close of the day, went to Nafe's house, inquired of Nafe the amount of compensation he required, and demanded the possession of the hogs. Nafe answered evasively as to the matter of compensation, and refused to surrender the property. The board of commissioners of Fulton county had previously ordered that only cows, heifers, steers, ewes and wethers should be allowed to run at large in Rochester township. Leiter thereupon commenced this action for the recovery of the possession of the hogs. At the proper time, Nafe entered a special appearance to the action, and moved to quash the writ, upon the ground that it did not, in at least one substantial respect, comply with the provisions of section 1270, R. S. 1881, but his motion was not sustained. This was followed by a verdict and judgment in favor of Leiter.

The objections made here to the proceedings below are only such as were assigned as causes for a new trial, and upon which, in this way, questions were intended to be reserved.

The first cause assigned for a new trial was the refusal of the circuit court to quash the writ, and a carefully prepared argument has been submitted in support of the claim that the writ ought to have been quashed. But this refusal of the circuit court was entirely preliminary to, and disconnected with, the trial. The motion to quash the writ was as much a separate and distinct proceeding as a demurrer to the complaint would have been, or as is a motion to quash an indictment in

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a criminal prosecution. Hence, to raise any question in this court upon the overruling of the motion to quash the writ, error ought to have been directly assigned upon that proceeding independently of anything connected with the trial; there is, consequently, no question before us upon the sufficiency of the writ.

The circuit court, upon its own motion, gave to the jury seven instructions in writing. The concluding part of the fifth instruction was as follows: "If the hogs were running at large, it made no difference whether they were on defendant's premises or not. An animal can not (however) be said to be running at large within the meaning of this statute" (section 2639, R. S. 1881), "if it should happen to break its owner's inclosure without his knowledge or consent."

The sixth instruction reiterated, substantially, the same doctrine, but in a more elaborate and somewhat modified form.

The seventh instruction told the jury: "If you find that the defendant complied with the law in taking up and impounding the hogs in dispute, then the plaintiff, immediately on being notified that they had been taken up and impounded, had the right to redeem them immediately after receiving notice that they had been taken up and impounded, and to take into his possession and control the hogs so taken up."

The defendant asked the circuit court to further instruct the jury that in case the hogs were lawfully taken up and impounded, the plaintiff was not entitled to regain possession of them until he either paid or tendered to the defendant \$1.50 for each animal for every day the hogs continued to be so impounded, but the court refused to instruct the jury as thus requested, and complaint is now made of instructions five, six and seven, given as above, and of the refusal to give this additional instruction.

Sections 2637 and 2638, R. S. 1881, have relation to the powers and duties of the boards of county commissioners of the several counties of the State in prescribing what kind of animals shall be allowed to run at large in the different town-

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ships of their respective counties. Section 2639 provides that, "Whenever any animal shall be found running at large or pasturing upon any of the uninclosed lands or public commons of any township in any county in this State which shall not be specified in the order of the board of commissioners of said county, as in the preceding sections provided, to have the right to so run at large or pasture thereon, any person being a resident of said township shall be authorized to take up and impound said animal in any private or public pound within said township."

Nafe's defence at the trial was that he found the hogs running at large within the meaning of the foregoing statute, and that he was hence authorized to take them up and impound them as he did; that having had the right to take up and impound the hogs, he was authorized to detain them until certain alleged statutory charges were either paid or tendered to him.

It is claimed that this defence was fully sustained by the evidence, and that for that reason, as well as for error in giving and refusing instructions, a new trial ought to have been granted.

It is a well recognized rule of judicial construction that in all statutory proceedings, more or less *ex parte* in their character, a strict compliance with the substantial provisions of the statute is necessary to the validity of such proceedings. *James v. Fowler*, 90 Ind. 563. It devolved, therefore, upon Nafe to show affirmatively, that, at the time he took up and impounded the hogs, they were running at large or pasturing upon *uninclosed* lands or public commons of the township. This, we think, he failed to do. He was the only witness who testified as to the circumstances under which the hogs were taken up and impounded. His statement on that subject was as follows: "The hogs, when I took them up, were in my pasture which was only partially inclosed; I put them in my back barn lot, fifteen rods square; the hogs, when I took them up, were running at large." This state-

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ment, when construed in the light of all the evidence, plainly implied that when the hogs were taken up, they were running at large only in Nafe's pasture, which was a piece of ground sufficiently inclosed to designate it, and set it apart, as a pasture either belonging to or under the control of Nafe. Lands may be only partially inclosed, and yet be sufficiently inclosed for many practical purposes. Partially inclosed lands can not, in the full sense of the term, be regarded as *uninclosed* lands. It became incumbent upon Nafe to divest the transaction of all perplexing obscurity, since he had assumed the burden of proving that when he took up the hogs they were running at large upon *uninclosed* lands. Therefore, as we construe the evidence, it fully sustained the verdict.

There was nothing in the instructions, given and objected to, which had any practical application to the case really presented by the evidence as we find it in the record. The jury were evidently not misled by any of these instructions. We need not, therefore, enter into any discussion of the abstract character of the instructions so given and objected to.

The necessary inference from what we have already said is, that Nafe was not entitled to any compensation for taking up and impounding the hogs. The circuit court, consequently, did not err in refusing to instruct the jury on the subject of his supposed right to compensation.

The judgment is affirmed, with costs.

Filed Sept. 25, 1885.

No. 12,488.

DENNIS v. THE STATE.

CRIMINAL LAW.—*Murder.—Sufficiency of Indictment.*—An indictment for murder, which charges that the killing was done by the defendant with a club, is not bad for failing to charge that the defendant held the club "in his hands."

SAME.—*Formal Charge of Assault not Necessary in Indictment for Murder.*—An

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| 155 | 408 |

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indictment for murder may be sufficient without charging the defendant in formal terms with the commission of an assault or an assault and battery on the body of the deceased.

SAME.—*Bill of Exceptions.*—*Omission of Caption.*—*Reporter's Manuscript of Evidence.*—Where a bill of exceptions, containing the official reporter's long-hand manuscript of the evidence, has no caption or preliminary statement, but it appears from the statement signed by the judge and from a memorandum of the clerk preceding and his certificate following, that such manuscript was properly incorporated in a bill of exceptions, such evidence is a part of the record.

SAME.—*Supplemental Motion for New Trial After Final Judgment.*—*When Should be Entertained.*—*Discretion of Court.*—It is within the discretion of the trial court during the term to entertain a supplemental motion for a new trial after final judgment; and in any case of felony, involving the life or liberty of the defendant, such motion, when founded upon matters occurring after final judgment, bearing strongly upon the guilt or innocence of the defendant and supported by affidavits filed therewith, should be heard.

SAME.—*Material New Evidence.*—*What Sufficient for New Trial.*—*Confessions.*—Where a conviction for murder rests on the evidence of one jointly indicted with the defendant, a subsequent confession by such witness which destroys his previous evidence and differs widely from his previous confessions, and materially affects the question of guilt, is a sufficient cause for a new trial.

From the Montgomery Circuit Court.

W. W. Thornton, D. W. Doty, J. M. Seller and J. W. Wright,
for appellant.

A. B. Anderson, Prosecuting Attorney, G. W. Paul, J. E. Humphries, M. D. White and W. S. Moffitt, for the State.

Howk, J.—On the 23d day of February, 1885, one John W. Coffey and the appellant, James M. Dennis, were jointly indicted in the court below for the murder of one James McMullen. The indictment was in two counts. The defendants severed in their defence, and the appellant, Dennis, having pleaded to the indictment that he was not guilty as therein charged, was awarded a separate trial. The issues joined as to appellant were tried by a jury, and a verdict was returned on the 22d day of April, 1885, in substance as follows: "We, the jury, find the defendant James Dennis guilty of murder

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in the first degree, as charged in the first count of the indictment, and fix his punishment at death."

Over the appellant's motions for a *venire de novo*, for a new trial, in arrest of judgment, and for his discharge from custody, on the 13th day of May, 1885, the court adjudged on the verdict that he suffer death, and from this judgment he has appealed to this court. Afterwards, on the 25th day of June, 1885, before the expiration of the time allowed appellant in which to prepare and file his bill of exceptions, he appeared in open court at the same term thereof, and filed what is called his supplemental motion for a new trial, supported by affidavits. Upon a hearing had of this motion, it was overruled by the court, and appellant's exceptions were duly saved to this ruling.

In this court, appellant has assigned a large number of errors on the record of this cause, and the questions thereby presented have been ably and exhaustively discussed by counsel on both sides, both orally and in written and printed briefs. The view we are constrained by our sense of judicial duty to take of this case will render it unnecessary for us to pass upon all the questions discussed by counsel, but some of those questions we will consider and decide.

It is claimed on behalf of appellant that the trial court erred in overruling his motion to quash each count of the indictment. In the state of the record, it is only necessary for us to consider the question of the sufficiency of the first count of the indictment, as appellant was found guilty solely of the offence charged in that count, and judgment of acquittal of the offence charged in the second count was rendered by the court. The first count charged, in substance, that Coffey and the appellant, "on the 7th day of January, A. D. 1885, at said county and State aforesaid, did then and there unlawfully, feloniously, purposely, and with premeditated malice, kill and murder one James McMullen, by then and there, feloniously, purposely and with premeditated malice, striking, bruising and mortally wounding the said James McMullen."

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len with a club, of which mortal wound the said James McMullen then and there died."

The first objection urged to this count of the indictment is, that it is not charged therein that the defendants, or either of them, then and there had or held the club "in their hands," with which it is alleged they killed and murdered McMullen "by striking, bruising and mortally wounding" him. There is no substance, we think, in this objection. It is true that such particularity of statement is found in the old common law forms of indictments, but it is not required, we think, under our criminal code. *Dukes v. State*, 11 Ind. 557. When we are convinced that the defendants might have killed and murdered McMullen, by striking, bruising and mortally wounding him with a club, without holding the club in their hands, it is possible, though hardly probable, that we may change our opinion on this question. As at present advised, we must hold that appellant's first objection to the first count of the indictment is not well taken.

The only other objection pointed out to the first count by appellant's counsel is, that it omits to charge the defendants, in formal and express terms, with the commission of an assault or an assault and battery on the body of James McMullen. It may be conceded that such a formal charge can be found in the old common law precedents of an indictment for murder. In this State, however, this court has given its sanction to the form of an indictment for murder, very similar to the one under consideration, and which contained no express charge either of an assault or an assault and battery. *Cordell v. State*, 22 Ind. 1. In the opinion of the court in the case cited, the indictment is copied at length and is held to be sufficient. To the same effect, substantially, are the following cases: *Veatch v. State*, 56 Ind. 584 (26 Am. R. 44); *Meiers v. State*, 56 Ind. 336; *Wood v. State*, 92 Ind. 269.

In the case in hand, the first count of the indictment charged the defendants, in plain and unequivocal language, which

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could not be misunderstood. by any man of common understanding, with the intentional and unlawful killing of James McMullen, with premeditated malice, and we think it was sufficient.

The important and controlling questions in this case arise, as it seems to us, under the alleged errors of the court in overruling the original and supplemental motions of the appellant for a new trial. It is insisted, however, by counsel for the State, that this court can not consider or decide any of the questions arising under either of such motions for a new trial, because, they say, the evidence given on the original trial is not made part of the record by a bill of exceptions. The objection urged to the bill of exceptions containing such evidence is that it has no caption, nor preliminary statement of any kind, to indicate that what follows was the evidence given on the trial of the cause. The evidence was taken down by the official reporter of the court, and the long-hand manuscript of such evidence, certified by such reporter in conformity with the statute, appears in the transcript before us without prefatory statement of any kind, except an index of the names of the several witnesses examined and of the page on which the testimony of each witness began. Immediately preceding this manuscript and index in the transcript is the following memorandum of the clerk: "Be it further remembered that afterwards, to wit, on the 18th day of July, 1885, the said defendant James Dennis, by his said attorneys, filed in the office of the clerk of said Montgomery Circuit Court the following bill of exceptions, namely."

Immediately following the certificate of the official reporter, annexed to his long-hand manuscript of the evidence, is the following statement, signed by the judge of the trial court, namely: "And this was all the evidence given in the cause. And the said defendant James Dennis now tenders this, his bill of exceptions, and prays that the same may be signed, sealed and made a part of the record, which is accordingly done this 17th day of July, A. D. 1885." Then

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follows the certificate of the clerk, under his hand and the seal of the court, to the effect "that the above and foregoing is the original long-hand manuscript of the evidence in the case of *The State of Indiana v. James Dennis*, filed in my office on the 18th day of July, 1885, and that the same was at that time incorporated into a bill of exceptions, as the same now appears."

Upon the foregoing statement of what is shown by the transcript, upon the point under consideration, we are of opinion that it sufficiently appears that the long-hand manuscript of the evidence was properly incorporated in a bill of exceptions, and that the evidence given on the trial of the cause is, therefore, a part of the record. Sections 629 and 1410, R. S. 1881; *Galvin v. State, ex rel.*, 56 Ind. 51.

Something has been said in argument by counsel for the State, to the effect that the filing of appellant's supplemental motiop for a new trial, after final judgment, was not authorized by any law or rule of practice. Such motion was filed during the same term of court at which final judgment was rendered, and such motion was entertained by the court, and, after a hearing thereon upon affidavits and oral evidence, was overruled by the court, all without objection or exception on the part of the State, so far as we can find. At all events, the action of the court in permitting appellant to file such motion is not called in question here by the State by any assignment of cross error. The question, we think, is not properly presented for our decision. But if it were we would be of opinion that the question is one which addresses itself to the sound discretion of the trial court, and that, in any case of felony, involving the life or liberty of the defendant, it would be an absolute abuse of such discretion to refuse to entertain a supplemental motion for a new trial, founded upon matters occurring after final judgment, bearing strongly upon the guilt or innocence of the defendant, and reasonably supported by the affidavits therewith filed. In this case, the supplemental motion for a new trial, and the affidavits and oral

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evidence introduced on the hearing thereof, are incorporated in a separate bill of exceptions, which is properly in the record. There is no error in the action of the court in entertaining appellant's supplemental motion, of which the State can be heard to complain.

Having now disposed of the State's objections to the record of this cause, we pass to the consideration of the appellant's case, as the same is presented in the transcript before us, upon the evidence introduced as well after as before final judgment.

James McMullen and his wife, in the early part of January, 1885, were the only occupants of a small farm-house of two rooms, remote from any city, town or village, in the county of Montgomery. Early in the morning of the 8th day of January, 1885, it was discovered that, during the preceding night, this farm-house had been consumed by fire. In the ashes and embers of the burned house, there were found in the east room the skeleton and remains of James McMullen, and the skeleton and remains of his wife in the west room. The indications were that both of them had been murdered, McMullen before he had prepared to retire for the night, and his wife after she had disrobed herself of outside garments preparatory to her retiring, and that the house had been partially robbed of its contents before it had been set on fire. Of course, the entire neighborhood was at once aroused, and steps were promptly taken to discover the perpetrator of the atrocious crime. Almost immediately, suspicion pointed to John W. Coffey, the co-defendant of the appellant in the indictment in this case, as a guilty actor in the murder of the McMullens, and in the felonious burning of their little home. Coffey was promptly arrested, and as promptly confessed that he, and he alone, was guilty of the murder of the McMullens, and that he, and he alone, had committed the bodies of his murdered victims to the flames, by setting on fire their dwelling-house.

Within a week after the murder of the McMullens, at the coroner's inquest upon their remains, Coffey was examined

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under oath, as a witness, by and before the coroner of Montgomery county. His testimony was reduced to writing, in a narrative form; and, "after it was written, it was read over to him, and he was asked if that was correct, and he said it was. He was asked if there was anything more he wished to say, and he said not that he knew of." Coffey then subscribed his name, in his own proper hand, to the written narrative of his testimony as taken by the coroner. This written narrative of Coffey's testimony was offered by appellant and admitted in evidence, without objection by the State, on the trial of this cause, and is properly in the record. This written narrative may properly be called Coffey's first confession, made within four days after the murder of the McMullens, when, it may be supposed, every act and circumstance of the horrible crime were fresh in his recollection. The narrative is entirely too long to be copied in this opinion, but we may say generally that it gives in detail every particular of the double murder he had committed, of his search for money and other plunder, and of his setting fire to the house wherein were the bodies of the murdered McMullens. In this narrative Coffey says: "No one was connected with me in the affair. I was alone, and no one knew my intentions. When I left John Fritz's house in the evening, I went on purpose to McMullens' to do what I did. It came on me all of a sudden at Fritz's house. My purpose was to get money."

When Coffey made this confession before the coroner, and it became generally known, there were many persons who believed, or professed to believe, that he alone did not commit the murder of the McMullens, but that he must have had accomplices, or have been aided and abetted by others in the commission of the crime. This is abundantly shown by Coffey's own testimony on the trial of this cause. These persons diligently pressed Coffey to make a further confession, and to tell who helped him in the commission of the crime, and suggestions were made to him of this one or that one, and,

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among others, of Dennis, the appellant, with inquiries as to whether or not the person named was not with him when the crimes were committed. All this was done notwithstanding the fact that in his testimony before the coroner Coffey had solemnly declared, under the sanction of his oath, that no one was connected with him in the affair, and that he was alone, and no one knew his intentions. Under such pressure, and with such suggestions, Coffey yielded in about ten days, and made what is called his second confession, implicating the appellant, Dennis, and making him the principal in the murders and arson committed, while Coffey, himself, is made to play only a secondary part in the terrible tragedy.

After this second confession was made by Coffey, the indictment was returned in this case against him and the appellant jointly. As we have seen, the appellant, Dennis, was awarded a separate trial, and, upon such trial, a verdict was returned finding him guilty of murder in the first degree, and assessing his punishment at death, and judgment was rendered accordingly. It is insisted very earnestly by appellant's counsel, that the verdict of the jury is not sustained by the evidence; but, in the view we take of this case, it is not necessary for us to consider or decide this question. On the trial, the principal witness for the State and against appellant was John W. Coffey, who testified in the main in accordance with his second confession, that he and appellant committed the murders of the McMullens and the arson of their home, but that appellant was the instigator and principal actor in the commission of the crimes, while he, Coffey, was chiefly a passive looker-on. It is to be observed that Coffey is the only witness who claims or admits that he has any personal knowledge of the commission of the murders of the McMullens. From our examination of the record before us, we feel justified in saying that the verdict of guilty against appellant is, and must be, rested on the evidence of John W. Coffey, and that if Coffey's evidence be eliminated or obliterated from

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the record, there is no case left against the appellant for the murder of James McMullen.

This brings us to the consideration of the supplemental motion of the appellant for a new trial, and of the evidence introduced upon the hearing of that motion. This evidence chiefly consists of what may be termed the third confession of John W. Coffey. This confession, in its details, is widely different from either of his previous confessions, and from his evidence given before the court and jury on the trial of this cause. In this third confession he says, in substance, that there were five persons in all who went to the home of the McMullens for the purposes of robbery and murder on the night of January 7th, 1885, namely, himself and appellant, Dennis, Monday Rankin, John Curtis and the old man Rankin; that when they got to the house, he, Coffey, stood at the gate and kept watch; that old man Rankin killed the McMullens by four shots from a navy revolver; that after the McMullens were thus killed, they all joined in searching the house, old man Rankin finding \$300 in an old trunk; that they bundled up feather beds and clothes in three bundles, which they carried away with them; and that, afterwards, Monday Rankin and John Curtis returned to the house and set it on fire. There is more of this third confession, but we have set out enough of it to show its utter inconsistency with the previous confessions of Coffey, and with his testimony on the trial of this cause. The evidence in regard to his third confession is uncontradicted by any testimony offered by the State.

It is claimed, however, on behalf of the State, that the evidence of the third confession is either cumulative or impeaching, and that, for evidence of either kind, the rule is that a new trial will not be granted. Doubtless, the rule of practice is correctly stated. But the evidence we are now considering is not cumulative in any proper sense, because its tendency will be to obliterate or destroy the previous evidence of John W. Coffey. The evidence of the third con-

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fession is something more than impeaching evidence, because, if believed by the jury, its tendency will be to defeat a verdict for the State on the indictment in this case. The materiality of the evidence of the third confession can not be doubted or denied, and it is impossible for the courts to tell how this third confession, in connection with Coffey's previous confessions, might affect the jury; and, in such a case, we understand the rule to be that a new trial should always be granted. Especially should this rule prevail in our State, where, by the fundamental law, it is expressly declared that "In all criminal cases whatever, the jury shall have the right to determine the law and the facts." Section 64, R. S. 1881. 3 Graham & Wat. New Trials, pp. 1043 and 1044; *Lindley v. State*, 11 Tex. Ct. App. 283; *Green v. State*, 17 Fla. 669.

By his third confession Coffey says, in substance and effect, that he had perjured himself in each of his previous confessions and in his testimony on the trial of this cause. We are met, therefore, with this question, Ought we to permit the appellant, who has been convicted upon confessedly false and perjured testimony, to suffer the extreme penalty of death? With a just sense, we hope, of our official duty, we answer this question in the negative.

The court erred, we think, in overruling the supplemental motion for a new trial.

The judgment is reversed, and the cause remanded, with instructions to sustain the supplemental motion for a new trial.

Filed Sept. 26, 1885.

No. 12,116.

MILLS ET AL. v. ROSENBAUM ET AL.

COSTS.—Counter-Claim.—Breach of Warranty.—Promissory Note.—Consideration.—Action in Circuit Court.—Recovery of Less than \$50.—In an action in the circuit court on a promissory note for \$125, the defendant pleaded in defence that the consideration of the note was the price of a horse,

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and that, by reason of a breach of the warranty under which the sale was made, he was damaged, etc. There was judgment for the plaintiff for less than \$50.

Held, that the defendant's pleading was a counter-claim (section 350, R. S. 1881), and that under section 591, R. S. 1881, the plaintiff was entitled to recover costs.

PLEADING.—Counter-Claim.—When the facts averred in an answer present a counter-claim, the fact that it is not formally pleaded as such is not material.

From the Posey Circuit Court.

A. P. Hovey and *G. V. Menzies*, for appellants.

W. P. Edson and *J. W. French*, for appellees.

MITCHELL, C. J.—The only question presented by the record before us relates to the ruling of the court on a motion to tax costs. This ruling was reserved as a question of law, and is presented by bill of exceptions as provided by section 630, R. S. 1881.

The complaint was upon a promissory note for \$125, executed by Mills & Spencer to one Tennison, and by him assigned without recourse to the Rosenbaums. One paragraph of the answer averred that the consideration of the note was the price of a horse sold by the payee to the makers; that the sale was accompanied by a warranty that the horse was sound and free from disease; that at the time of the sale and warranty the horse had a malady which affected his eyes; that this was known to the seller and unknown to the purchaser, and that, from the disease then existing, the animal subsequently became totally blind, by reason of which he was worth \$100 less than he otherwise would have been, and that by reason thereof the consideration of the warranty failed to the amount of \$100.

There was a verdict for the plaintiffs for \$47.04, and, over a motion to tax the costs to the plaintiffs, there was judgment in their favor for the amount of the verdict and costs.

Section 591, R. S. 1881, provides as follows: "In actions for money demands on contract commenced in the circuit or

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superior courts, if the plaintiff recover less than fifty dollars, exclusive of costs, he shall pay costs; unless the judgment has been reduced below fifty dollars by a set-off or counter-claim pleaded and proved by the defendant, in which case the party recovering judgment shall recover costs." Was the judgment reduced below \$50 by a counter-claim? Counsel insist that the case is ruled by *Moore v. Newland*, 90 Ind. 409. That was a suit to recover for work and labor, and of the answers filed it was said by FRANKLIN, C.: "We do not think these paragraphs of answer can be placed under the head of counter-claim or set-off. Neither of them claims anything due the defendant, or that he has sustained any damage connected with or growing out of the cause of action, in reduction of plaintiffs' claim." This can not be said of the defence pleaded in this case, the gist of which is, that by reason of the breach of warranty under which the sale was made, the defendants were damaged in the sum of \$100. This they seek to recoup from the plaintiffs' claim.

Some confusion has arisen by treating defences of this character as failure of consideration. They are, on the contrary, of the very essence of a counter-claim, the statutory definition of which is "any matter arising out of or connected with the cause of action which might be the subject of an action in favor of the defendant, or which would tend to reduce the plaintiff's claim or demand for damages." Section 350, R. S. 1881.

What was embraced in a statutory counter-claim was considered in *Standley v. Northwestern M. L. Ins. Co.*, 95 Ind. 254, where it was shown that counter-claim under the code includes the element of recoupment.

When the facts averred in an answer present a counter-claim, the fact that it was not formally pleaded as such can make no difference. It will be judged by what it is, and not by what it is called. *Fuller v. Curtis*, 100 Ind. 237 (50 Am. R. 786).

The facts set up in the answer in this case are connected

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with the cause of action. They might have been the subject of an independent action in favor of the defendants, and they did tend to reduce the plaintiffs' claim. The demand set up by the plaintiffs in their complaint, and the cross claim of the defendants, pleaded in their answer, both spring out of the same transaction, which upon the complaint and answer is opened up for the purpose of settling the mutual claims of the parties thereunder.

Pleaded by way of answer, the counter-claim can, of course, in no case authorize a judgment for the defendant, except as the statute may regulate the judgment for costs.

Judgment affirmed, with costs.

Filed Sept. 24, 1885.

No. 11,754.

LOTZ v. SCOTT ET AL.

EVIDENCE.—Expert.—Hypothetical Case.—Where a hypothetical case, covering the leading facts testified to, and practically admitted, is stated to a witness shown to be an expert, his opinion, based on such hypothetical case, is proper evidence.

SAME.—Damages.—Adjoining Owners.—In an action for damage to the wall of a building, caused by the drippings from the eaves of an adjoining house, evidence that the bad condition from dampness, if such was their condition, of other brick walls in the immediate vicinity, against which there were no drippings from the eaves of adjoining houses, is admissible.

ESTOPPEL.—Adjoining Buildings.—Damages.—Where the owner of a building extends his building over onto an adjoining lot, on which a house is already standing, such owner will not be heard to complain that his neighbor's house is too close, or in injurious proximity to his building.

From the Sullivan Circuit Court.

J. T. Hays, H. J. Hays, W. S. Maple, W. C. Hultz and J. C. Chaney, for appellant.

S. C. Coulson, J. S. Bays and J. C. Bays, for appellees.

NIBLACK, J.—The controversy which resulted in the bringing of this action arose out of substantially the following state

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of facts: In-lot No. 45, of the town of Sullivan, in this State, fronts on the north side of the public square of that town. Some time, perhaps several years, previous to 1863, a frame house, about forty feet long and twelve feet high, was built on a subdivision of that lot. This subdivision fronts twenty feet on the public square, and its west line runs back parallel with, and twenty feet west of the east line of the lot. The frame house had a shingle roof, sloping east on one side and to the west on the other, and did not cover all the subdivision of the lot on which it was erected. There was an open space of several inches between the west wall and the west line, so that the drip from the eaves on the west side fell upon this open space, that is to say, upon the strip of ground upon which the house was so erected. In 1863, Lotz, the appellant, became the owner of this frame house and strip of ground, and so continued to be at the time of the commencement of this suit. In 1871, another person built a brick house, about sixty-five feet long and thirty feet high, with the roof sloping to the north, on a subdivision of the above named in-lot No. 45, adjoining and immediately west of the subdivision upon which the frame house stood. The east outside wall of a brick building previously erected, and known as the Draper building, constituted the west wall of this new brick building. Early in the year 1881, the appellees, Charles Scott and Cynthia A. Carrithers, became the owners of the new brick house in question, the east wall of which was afterwards ascertained to be, on the west, or inside and lower part, in a damp, damaged and generally bad condition as the result of an apparent flow or accumulation of water from some source. The appellees, claiming that this damp and damaged condition of this east wall resulted from the drippings from the adjacent eaves of the frame building, commenced this suit against Lotz, as its owner, for damages, and for an injunction to restrain him from permitting the water to drip from the eaves of his house, to the injury of the appellees' building.

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A temporary restraining order was granted, but before the cause came on for trial the frame building burned down. The circuit court, after hearing the evidence, made a finding for the appellees, assessing their damages at twenty dollars, and rendered judgment accordingly.

Questions were reserved below upon the sufficiency of the evidence to sustain the finding, as well as upon the admission and exclusion of evidence. The damp and damaged condition of the wall was a practically admitted fact at the trial. All the witnesses who had examined it testified to the wet and rotten condition of the plastering and papering in certain places. Some of the witnesses held and advocated conflicting theories as to where the water came from which inflicted the injuries complained of.

The theory of the defence was that the water came from the ground below in which the foundation of the wall was laid.

One Hubbard was called as a witness by the appellant. He testified that he had been a bricklayer and plasterer for thirty years continuously; that he was one of the contractors who had built the house belonging to the appellees; that he had also helped build all of the walls except two of the six buildings immediately west of the Draper building; that when he and his co-contractor caused the ground to be excavated for the foundations of the north, east and south walls of the appellees' building, water came out from under the Draper building, and those other buildings west, and filled up the excavations, so that the foundations of these walls had to be laid in water.

A hypothetical case, covering the leading facts testified to, and practically admitted, as above, was stated to the witness, upon which his opinion was asked as to what produced the dampness on the west, or inside of the wall of which the appellees complained. This question was accompanied by a statement that the appellant expected to prove by the witness that in his opinion the dampness came from below, and not

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from the eaves of the frame house. But the circuit court refused to permit the question to be answered. Some inquiries as to the condition of the west wall, being also the east wall of the Draper building, were also excluded.

In our view of this case, these rulings restricted the appellant too much, and very materially, in his defence. Hubbard showed himself to be an expert in the matters of bricklaying and plastering, and nothing has been presented from which we can infer that the appellant was not entitled to his opinion as to what caused the bad condition of the wall. *City of Indianapolis v. Huffer*, 30 Ind. 235. The bad condition from dampness, if such was their condition, of other brick walls in the immediate vicinity, against which there were no drippings from the eaves of any house, also constituted circumstances which the appellant had a right to have considered by the court.

The evidence tended very clearly to establish the fact that the appellees' building lapped over onto, and appropriated, a small strip of the subdivision of ground upon which the frame house was at the time standing. Conceding that fact to have been satisfactorily established, as it seemingly was, we regard it as fatal to the appellees' right to recover in this action. It will not do to hold that the proprietor of a building may extend his building over on to his neighbor's ground, where a house is already standing, and then be heard to complain that his neighbor's house is too close, or in injurious proximity to his building. In any view which we have been able to take, the case is an unsatisfactory one upon the evidence.

Whether, when a person, building a house in close proximity to the drippings from the eaves of his neighbor's house, where such drippings naturally fall upon his neighbor's side of the partition line, is, or is not, bound to fend off against the injurious consequences which may result from the drippings, is a question not now before us, and hence is one upon which we express no opinion at the present hearing.

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The judgment is reversed, with costs, and the cause remanded for further proceedings.

Filed Oct. 7, 1885.

No. 11,881.

RINEHART ET AL. v. VAIL, ADMINISTRATOR, ET AL.

DECEDENTS' ESTATES.—Sale of Real Estate by Administrator.—Appeal.—The proceeding for the sale of real estate by an administrator is regulated exclusively by the act for the settlement of decedents' estates, and an appeal by an aggrieved party must be taken under the provisions of such act.

SAME.—Filing Appeal Bond and Transcript.—Time.—Dismissal.—Practice.—Under sections 2454 and 2455, R. S. 1881, and the amendment of 1885 (Acts 1885, p. 194), an appeal bond must be filed, except where the administrator appeals, within ten days from the date of the decision, and the transcript must be filed within thirty days from the filing of the bond, unless, for good cause shown, the Supreme Court shall direct such appeal to be granted, on the filing of a bond, within one year; otherwise the appeal will be dismissed.

From the Dearborn Circuit Court.

S. P. Thompson, for appellants.

D. Turpie, H. D. McMullen, J. D. Haynes and J. K. Thompson, for appellees.

MITCHELL, C. J.—This was a proceeding commenced in the Dearborn Circuit Court by the petition of Benjamin F. Vail, administrator, for the sale of the real estate of Sarah A. Vail, deceased, to pay the debts of the decedent.

The lands for the sale of which the administrator petitioned were situate in Pulaski county, Indiana. The heirs at law and others, including the appellants, were made defendants. The petition was heard and determined in the Dearborn Circuit Court, that being the court having the administration of the estate in charge.

The appellants demurred to the petition, and after the de-

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murrer was overruled, they answered in abatement. Demurrers were sustained to the answers in abatement, after which, upon issue made by denial, there was a hearing, which resulted in an order for the sale of the land according to the prayer of the petition. From this order this appeal is prosecuted. The appellee interposes a motion to dismiss the appeal, alleging as cause, that it was not taken in the manner and within the time prescribed by sections 2454 and 2455, R. S. 1881. The order appealed from was given September 6th, 1883. The appeal was taken by filing a transcript in the office of the clerk of this court September 1st, 1884. No bond has been filed, and the appeal seems to have been taken upon the assumption that it was governed by the rules regulating appeals in common law cases under the civil code. The appellee, without joining in error or agreeing to a submission of the cause, or in any other manner waiving a compliance with the statute regulating appeals, in matters connected with decedents' estates, insists upon his motion to dismiss. Section 2454 provides that "Any person considering himself aggrieved by any decision * * * growing out of any matter connected with a decedent's estate, may prosecute an appeal to the Supreme Court, upon filing, with the clerk of such circuit court, a bond with penalty in double the sum in controversy, in cases where an amount of money is involved (or where there is none, in a reasonable sum, to be designated by such clerk)," etc. Section 2455 enacts that "Such appeal bond shall be filed within ten days after the decision complained of is made, unless, for good cause shown, the court to which such appeal is prayed shall direct such appeal to be granted on the filing of such bond within one year after such decision. * * * The transcript shall be filed in the Supreme Court within ten days after filing the bond."

That the decision from which the appeal was taken in this case was made in a proceeding growing out of a matter connected with a decedent's estate, and that appeals in all such cases must be taken in conformity with the foregoing stat-

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utes, unless the requirements thereof are waived, must be taken as settled. *Seward v. Clark*, 67 Ind. 289; *Bell v. Mousset*, 71 Ind. 347; *Hillenberg v. Bennett*, 88 Ind. 540; *Browning v. McCracken*, 97 Ind. 279.

The sale of real estate by an administrator is provided for and regulated exclusively by the act for the settlement of decedents' estates. The civil code makes no provision for such proceedings, and they are not within the ordinary common law jurisdiction of the circuit court. The proceeding must, therefore, be had, and the appeal taken, under the provisions of the statute for the settlement of decedents' estates. Under the sections above quoted and the amendment contained in the acts of 1885 (Acts 1885, p. 194), an appeal bond must be filed—unless the appeal is taken by the administrator, when no bond is required—within ten days from the date of the decision, and the transcript must be filed within thirty days from the date of the filing of the bond, unless for good cause shown this court shall direct such appeal to be granted, on the filing of a bond, within one year.

No bond having been filed either within the time prescribed or since, and no application having been made to this court to be permitted to file a bond, and perfect the appeal within a year, the sustaining of the motion to dismiss seems to follow inevitably.

Motion sustained and appeal dismissed with costs.

Filed Sept. 26, 1885.

No. 12,558.

THE STATE, EX REL. MORRISON, SURVEYOR, v. MORRIS,
AUDITOR.

JUDGMENT.—*Collateral Attack.*—*Appeal.*—*Review.*—A judgment which is erroneous, but not void, is good as against a collateral attack. The remedy is by appeal or complaint for review.

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MANDATE.—*Return.*—*County Auditor.*—*Allowance.*—To an alternative writ of mandate directed to a county auditor, requiring him to show cause why he should not draw a warrant on the county treasury for the amount of an allowance made by the circuit court, it is a good return that the order of such court directed that such allowance should be paid by another person out of another fund, and that the claim had never been presented to and allowed by the board of county commissioners.

SAME.—*Return Need not be Verified.*—*Pleading.*—*Practice.*—The return to a writ of mandate need not be verified, as, under section 1171, R. S. 1881, issues of law and fact may be joined and trial had as in civil actions.

From the Henry Circuit Court.

D. W. Chambers, J. S. Hedges and F. W. Fitzhugh, for appellant.

J. M. Morris, for appellee.

Howe, J.—On the verified complaint of the appellant's relator, Robert I. Morrison, surveyor and *ex officio* commissioner of drainage of Henry county, an alternative writ of mandate was issued in this cause, directed to the appellee Morris, auditor of such county. The appellee appeared and made his return or answer to such writ, to which return or answer the relator's demurrer, for the alleged want of sufficient facts, was overruled by the court. The relator refused to reply or plead further to appellee's return or answer, and judgment was rendered against him for the appellee's costs.

In this court the relator has assigned as errors the following decisions of the circuit court:

1. In overruling his demurrer to appellee's return or answer; and,

2. In overruling relator's motion to strike out and set aside the appellee's return or answer, because it was not verified.

In his return or answer to the alternative writ of mandate, the appellee admitted that the relator was the duly elected, qualified and acting surveyor of Henry county, and that appellee was the duly elected, qualified and acting auditor of such county, and that the relator performed services, as alleged in his complaint, in the establishment of the "W. F.

The State, *ex rel.* Morrison, Surveyor, v. Morris, Auditor.

Smith" ditch. The appellee further admitted that the relator filed his claim for such services in the sum of twenty-five dollars, which claim was allowed in full by the Henry Circuit Court, and that a certified copy of such allowance was presented to and filed with the appellee, and payment thereof demanded, by the relator, as alleged in his complaint. But the appellee averred that the order of allowance, so made to the relator by the Henry Circuit Court, did not command the appellee to draw his warrant on the county treasurer for the payment of such allowance out of the county treasury, but that such order of allowance reads as follows: "Which accounts are now submitted to the court, and the court having examined the same, and being fully advised, allows said accounts to be paid by commissioner out of assessments made on said ditches, to which ruling of the court said Morrison excepted at the time, and the court grants thirty days' time in which to file bill of exceptions herein;" that such order of allowance expressly provided that such allowance should be paid by the commissioner of drainage, to whom such ditch was referred for construction, out of the assessments of benefits to the land-owners whose lands were benefited by such ditch; that at the time of the allowance of the relator's claim assessments of benefits to the lands affected by such ditch had been, by the commissioners of drainage of Henry county, reported to and approved and confirmed by the court below to the amount of \$1,505, and the construction of such ditch referred to commissioner Jacob W. Yost; that commissioner Yost had caused a notice of such assessments of benefits to the lands affected by such ditch to be recorded in the recorder's office of Henry county, wherein such lands were situated; that the proceedings of the court, approving and confirming such report of assessments, were unappealed from, and such assessments were valid and subsisting liens upon the lands so assessed to such amount of \$1,505, and that such assessments, at the time this action was commenced, were each and all due and collectible.

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And the appellee averred that the relator's claim had not been presented to and allowed by the board of commissioners of Henry county, nor was the same for a sum allowed or certified to be due and payable out of the county treasury, by any court of record authorized to use a seal, and having jurisdiction beyond that of justices of the peace. Wherefore, etc.

It is shown by the relator, in his verified complaint, that the allowance of the court, which he seeks in this suit to compel the appellee, as county auditor, to draw his warrant for on the county treasury, was made and directed by the court to be paid by the commissioner of drainage out of the assessments made on the "W. F. Smith" ditch, at the September term, 1884, of such court. At that time the law of this State governing such allowances was section 4283, R. S. 1881, wherein it was provided as follows: "For their services under the third section of this act (section 4275) the commissioners of drainage and engineer, and the chainman, axeman, and rodman by them employed, shall be allowed and paid out of the county treasury such compensation as the court shall determine. The commissioner charged with the construction of a work for drainage shall be paid for such services out of the funds raised for its construction."

Under this section of the statute, it is earnestly insisted on behalf of the relator that he was and is entitled to have his compensation for his services on the "W. F. Smith" ditch allowed and paid out of the county treasury. In this view of the statute, we should probably agree with the relator's counsel, if the question were presented here by his appeal from the court's order of allowance. But the court, in making such order of allowance, had jurisdiction of the subject-matter and of the relator's person, and, in such a case, it will not do to say that the court's order of allowance, or any part of it, was or is void. The most that can be said in favor of the relator, adopting his own view of the section of the statute above quoted, is that the Henry Circuit Court erred in its order allowing his compensation for his services to be paid out of the

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assessments for the ditch, instead of directing payment to be made out of the county treasury. For such an error the relator's remedy was either a complaint for review for apparent error of law, or an appeal to this court, within the time provided by laws. The order of allowance, in whole and in part, is absolutely impervious to a collateral attack by the relator, who was a party to such order. *Dowell v. Lahr*, 97 Ind. 146; *Carrico v. Tarwater*, *ante*, p. 86.

The order of allowance in favor of the relator was an entirety, and could only be certified as such by the clerk of the Henry Circuit Court. Thus certified, the order afforded no authority whatever to the appellee, as county auditor, to draw his warrant on the county treasury for the amount of the allowance, because, on its face, the order directed that the allowance should be paid by another person out of another fund. In addition to this it was averred by appellee in his return or answer, that the relator's claim herein had never been presented to and allowed by the board of commissioners of Henry county. *Pfaff v. State, ex rel.*, 94 Ind. 529; *Morris v. State, ex rel.*, 96 Ind. 597. Appellee's return or answer was sufficient, and the relator's demurrer thereto was correctly overruled.

Relator's counsel claim that the court erred in overruling his motion to strike out and set aside appellee's return or answer, because it was not verified. We know of no provision of our code, nor rule of practice, and counsel have cited none, which requires the verification of such return or answer. Fairly construed, the provisions of section 1171, R. S. 1881, contemplate that, in proceedings by mandate, issues of law and fact may be joined and trial thereof had as in civil actions. The court did not err, we think, in overruling the motion to strike out and set aside the return or answer for the want of verification.

We find no error in the record of this cause.

The judgment is affirmed, with costs.

Filed Oct. 6, 1885.

Grubbs *et al.* v. Morris *et al.*

No. 12,030.

GRUBBS ET AL. v. MORRIS ET AL.

ASSIGNMENT FOR THE BENEFIT OF CREDITORS.—General and Partial.—
Preference of Creditors.—Under the statute of this State, where a debtor in failing circumstances makes a general assignment of all of his property in trust for the benefit of all of his creditors, he can not prefer any creditor, but must place all of them upon an equality. *Aliter*, where there is only a partial assignment.

SAME.—General Rule as to Preference.—The general doctrine that a debtor may prefer a creditor does not apply where the assignment is made in the cases contemplated by the statute.

PLEADING.—Exhibit.—Practice.—Where an instrument is set forth in a complaint, or made an exhibit thereto, it is sufficient to refer to it in the answer without again making it an exhibit.

PRACTICE.—Objections to Admission of Evidence.—Bill of Exceptions.—Objections to the admission of evidence must be specific, and the grounds upon which they are based set forth in the bill of exceptions.

From the Henry Circuit Court.

J. M. Morris, for appellants.

J. Brown, W. A. Brown, J. H. Mellett and E. H. Bundy, for appellees.

ELLIOTT, J.—The theory of the complaint of the appellants is that Francis M. Crull assigned to George B. Morris notes and accounts in trust, and that the purpose of the trust was to enable Morris to collect the notes and accounts and use the proceeds in paying the indebtedness of the assignor to the appellants and to Robertson and Perry. To the complaint the appellees addressed an answer containing, in substance, these allegations: That Francis M. Crull, being in failing circumstances, and not having sufficient property to pay his debts, made an assignment to George B. Morris of all his property and choses in action for the benefit of all of his creditors; that the assignment was in writing and under seal; that it provided that John W. Grubbs and Robertson and Perry should be preferred creditors, and that the claim of the appellants is founded solely on this assignment.

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| 141 | 539 |
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The important question presented by this answer is whether the assignment to Morris is valid? The contention of the appellants is, that a debtor may prefer such creditors as he chooses. The position of the appellees is, that the statute prohibits the preference of creditors in a general deed of assignment.

The provision of the statute is this: "Any debtor or debtors in embarrassed or failing circumstances may make a general assignment of all his or their property, in trust for the benefit of all his or their *bona fide* creditors; and all assignments hereafter made by such person or persons for such purpose, except as provided for in this act, shall be deemed fraudulent and void." Sec. 2662, R. S. 1881. There are also provisions as to the form and method in which the deed shall be executed, as to the duties of the trustee named in the deed, as to the power and duty of the court, and as to the distribution of the proceeds of the property conveyed to the trustee, but there is no provision that in express words prohibits the preference of creditors. The provision quoted, when taken in connection with the other provisions of the statute, and considered in connection with the general spirit and purpose of the law, does authorize the conclusion, that where a debtor, in failing circumstances, makes an assignment of all of his property for the benefit of all of his creditors, he can not prefer one or more creditors, but must place all of them upon an equality. The general doctrine that a debtor may prefer a creditor has been too long established in this State to be now departed from. *Lord v. Fisher*, 19 Ind. 7; *Wilcoxon v. Annesley*, 23 Ind. 285. But this general doctrine does not apply where the assignment is made in the cases contemplated by the statute, and for which it makes provision. The statute is evidently intended to secure an equal distribution of the debtor's property among all of his creditors, and it does secure to them and to the debtor important rights. It places the trustee, or assignee, under the control and supervision of the courts, and the property is, in a qualified sense at least,

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in the custody of the law.. It is so far in the custody of the law that the trustee can, under the supervision of the court, control and dispose of it without being embarrassed or annoyed by levies of executions or attachments. The statute prevents the sacrifice of the property upon execution sales, and secures equal rights to all creditors, and thus secures a benefit to the debtor as well as to the creditors. Where the property is conveyed by an assignment not made under the statute, it may be made subject to the claims of creditors when of greater value than the debt it was conveyed to secure, that is, the surplus over the amount required to pay the debt secured may be reached by legal process, but when the property goes into the hands of an assignee or trustee under the statute, it is so far *in custodia legis* that it can not be levied upon, but must be disposed of by the assignee under the supervision of the court and in the manner provided by the statute.

Where property is absolutely conveyed to a creditor to pay a debt, the rule we have laid down can not govern, for it is well settled that such conveyances are valid. *Boling v. Howell*, 93 Ind. 329, *vide* p. 331; *Dessar v. Field*, 99 Ind. 548. Where there is only a partial transfer of property, as where part only of the debtor's property is conveyed, or where only one creditor is preferred and there is no general assignment, a conveyance to a trustee will, according to our decisions, be sustained as not in contravention of the statute. The case of *Cushman v. Gephart*, 97 Ind. 46, supports our conclusion. It was there said: "This statute only provides for a general assignment of all a debtor's property for the benefit of all his creditors. And when that is attempted, the statute must be complied with, or the assignment, without regard to actual fraud, will be held fraudulent and void, but an assignment by a debtor for the benefit of a part of his creditors, in order to be held void, must be actually fraudulent." *Thompson v. Parker*, 83 Ind. 96, goes somewhat further than the case from which we have quoted, further, perhaps, than the earlier and later decisions warrant.

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For many years the courts have been earnestly condemning the rule that permits a preference of creditors where property is conveyed by the debtor to a trustee. In *Riggs v. Murray*, 2 Johns. Ch. 565, Chancellor Kent very strongly censures the rule and clearly demonstrates its injustice, and many other courts have expressed similar views. *Cunningham v. Freeborn*, 11 Wend. 240, *vide* p. 256; *Burd v. Smith*, 4 Dall. 76; *Pingree v. Comstock*, 18 Pick. 46; *Atkinson v. Jordan*, 5 Ohio, 293; *Beers v. Lyon*, 21 Conn. 604.

In a treatise on conveyances in trust and assignments for the benefit of creditors, the difference between the direct conveyance of property by the debtor to the creditor is pointed out, and it is said: "But where an insolvent debtor, instead of retaining the dominion of his property, divests himself of it by a general assignment to a trustee, with directions to the latter to apply it in satisfaction of certain specified debts, to the exclusion or postponement of others, he places the rights of unpreferred creditors on quite a different and much less favorable footing. Deprived by such a transfer of all remedy against the property except where the assignment can be avoided as fraudulent or illegal, they are compelled to await the uncertain result of the execution of the trust in its due course, with all the delays necessarily attendant on the processes of collection, sale, and distribution by the assignee, and are effectually turned over to the remote chances of sharing in a possible surplus remaining after full satisfaction of the claims preferred. The temptations to the abuse or inequitable exercise of the right of preference itself in this form, and the facilities for reserving undue advantages to the debtor, through the services of a friendly trustee, are other evils attending the unrestricted allowance of the right to favor one creditor at the expense of another through the medium of this description of conveyance." Burrill Assignments, section 163.

There is strong reason supporting the position that the statute was intended to apply to all conveyances in trust for

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the benefit of creditors, but the rule that it does not apply to partial assignments in trust has been so long acted upon that we can not, whatever may be our views, now depart from this established rule. We have in this instance a case fully within the letter and the spirit of the statute, for all the elements of a statutory assignment are present, and we can do no otherwise than hold that the statute governs it.

Where an instrument is set forth in a complaint, or made an exhibit to that pleading, it is sufficient to refer to it in the answer without again making it an exhibit. *Sidener v. Davis*, 69 Ind. 336; *Crowder v. Reed*, 80 Ind. 1, *vide* p. 4.

The objections to the admission of the deed of assignment of December 31st, 1883, are not sufficiently specific to present any questions on appeal. Objections must be specific, and the grounds upon which they are based set forth in the bill of exceptions. *Indiana, etc., R. W. Co. v. Cook*, 102 Ind. 133; *Shafer v. Ferguson*, *ante*, p. 90. The evidence supports the finding.

Judgment affirmed.

Filed Oct. 8, 1885.

No. 12,365.

THE STATE v. ANDERSON.

CRIMINAL LAW.—Perjury.—Indictment.—Language of Statute.—Words of Equivalent Meaning.—An indictment for perjury is not bad for omitting the word “falsely,” as used in the statute in connection with the swearing, if other words conveying the same meaning are used.

SAME.—Affidavit for Continuance.—Facts Sworn to Must be Material.—An indictment for perjury, under section 2006, R. S. 1881, predicated upon an affidavit for a continuance of a pending cause, must show by a specific averment or by the statement of the facts, that the swearing was touching matters material to the point in question.

SAME.—Description of Cause in Which Affidavit is Filed.—Motion to Quash.—Where the indictment does not allege the materiality of the facts stated in the affidavit, and does not describe the cause in which such affidavit

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was made with sufficient certainty to show such materiality, it is bad on motion to quash.

From the Knox Circuit Court.

F. T. Hord, Attorney General, *W. A. Cullop*, Prosecuting Attorney, *G. W. Shaw* and *C. B. Kessinger*, for the State.

ZOLLARS, J.—The following indictment was returned against appellee, to wit :

“THE STATE OF INDIANA, COUNTY OF KNOX.

“*The State of Indiana v. George W. Anderson.* Indictment for perjury.

“The grand jurors of the county of Knox, upon their oath, do present, that one George W. Anderson, on the 20th day of January, 1885, at the county of Knox, and State of Indiana, did then and there, for the purpose of obtaining a continuance to another day of the trial of a certain civil action then and there pending before Edward McCrissoken, a justice of the peace of Vincennes township, Knox county, Indiana, wherein the State of Indiana, on the relation of Ella Walker, was plaintiff, and said George W. Anderson was defendant, did then and there feloniously, wilfully and corruptly, and voluntarily, make a certain false affidavit, and did then and there subscribe his name to said affidavit for the purpose of obtaining said continuance, and then and there feloniously, wilfully, corruptly and voluntarily took upon himself his corporal oath, and was then and there duly sworn that the contents of said affidavit were true in substance and in fact, which said oath was then and there administered to him by said Edward McCrissoken, justice of the peace as aforesaid, and who then and there had competent authority to administer oath in that behalf. That in said affidavit, made as aforesaid, for the purpose aforesaid, he, the said George W. Anderson, did then and there say, in behalf of himself, who was then and there defendant in said cause then pending in said court, under oath : ‘ Defendant says he is informed, and believes if he is granted the time under the law so to do, that

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he can prove by two men, at least, residing in Laporte, in Laporte county, in the State of Indiana, and they will testify that during her, Ella Walker's, stay there, in June and July, 1884, and since that time, they, each of said men, had sexual intercourse with her, and that during said time in Laporte she became pregnant, if at all, with a bastard child, and this defendant is not the father of said bastard child. Defendant says he can not give the names of said men at this day, nor time, because he has not been able to go to Laporte to ascertain their said names, for this reason, that on the 8th day of January, 1885, he was arrested in this case while just going out on his boat on a trip, and he did not return until the 17th day of January, 1885.' Which said affidavit was then and there, to wit, on the 20th day of January, 1885, subscribed by the said George W. Anderson, and sworn to by him before Edward McCrissoken, justice of the peace as aforesaid."

Here follows specific negations of every fact so sworn to in the affidavit. Following these negations the indictment is as follows: "And the said George W. Anderson then and there well knew that all of the portion of said affidavit above set out was wholly false. Wherefore the grand jury aforesaid, upon their oath aforesaid, do say that the said George W. Anderson, in manner and form as aforesaid, on the 20th day of January, 1885, in the county and State aforesaid, for the purpose of obtaining a continuance as aforesaid, did then and there, wilfully, feloniously, knowingly and voluntarily commit wilful and corrupt perjury."

On motion of appellee the indictment was quashed. The State has appealed.

There is no brief for appellee. We are informed by the prosecuting attorney in his brief, that the indictment was quashed upon the grounds: *First*. That it does not charge the offence in the language of the statute defining the offence of perjury; and, *Second*. That the action pending before the justice of the peace, in which the affidavit was filed, is not sufficiently described.

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The statute provides that an indictment is sufficient if it can be understood therefrom: "*Third.* That an offence was committed within the jurisdiction of the court, or is triable therein. *Fifth.* That the offence is stated with such a degree of certainty that the court may pronounce judgment, upon a conviction, according to the right of the case." R. S. 1881, section 1755. It is further provided that no indictment shall be deemed invalid, nor shall the same be set aside or quashed, for any of the following causes: "*Sixth.* For any surplusage or repugnant allegation, when there is sufficient matter alleged to indicate the crime and person charged. *Tenth.* For any other defect or imperfection which does not tend to the prejudice of the substantial rights of the defendant." R. S. 1881, section 1756. It will be seen that these statutes provide for liberal rules to be applied in passing upon the sufficiency of indictments.

There are two sections of the statute providing penalties for perjury, in each of which the words "wilfully, corruptly and falsely" are used in connection with the swearing. It is charged in the indictment before us, that appellee made a false affidavit to procure a continuance in a cause in which he was defendant. The charge is in the words of the statute except that the word *falsely* is omitted, and in its stead the word "feloniously" is used. It is charged that the affidavit was false, and that appellee well knew that the affidavit and all stated therein were wholly false, and that he wilfully, knowingly and voluntarily committed wilful and corrupt perjury. These several charges, in connection with the word *feloniously*, we think, ought to be regarded as the equivalent of the word "falsely." Under our statute and the decisions of this court, the indictment need not be in the exact words of the statute, but other words conveying the same meaning may be used. R. S. 1881, section 1737; *Malone v. State*, 14 Ind. 219; *State v. Gilbert*, 21 Ind. 474; *State v. Walls*, 54 Ind. 561; *Shinn v. State*, 68 Ind. 423. In the last case, it was

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held that the word "feloniously" is the equivalent of the word "unlawfully," used in the statute.

The case of *State v. Dark*, 8 Blackf. 526, was based upon a statute which enacted that every person who should "*falsely* make, deface, destroy, etc., any record, etc., shall be deemed guilty of forgery."

It was not charged in the indictment, that the offence was *falsely* committed, and for this reason there was a motion to quash it. For the word *falsely* in the statute, the words *unlawfully* and *feloniously* were used in the indictment. It was held that these words are more than equivalent to the word *falsely*, and that hence the indictment should not have been quashed. This case seems to be directly in point here, and sustains the indictment.

Mr. Bishop, in his work on Criminal Procedure, at section 922, vol. 2, says: "'Falsely' can not be essential, because the assignment of the perjury avers the swearing to be false."

We think that, taking the several charges in the indictment together, and keeping in view the liberal rules fixed by the statutes, they show and charge that the affidavit was *falsely* made, and that the omission of the word "*falsely*" is not a sufficient ground for quashing the indictment.

In claiming that the cause pending before the justice of the peace, and in which the perjury is charged to have been committed, is sufficiently described in the indictment, counsel for the State make the mistake of assuming that the prosecution is based upon section 2007, R. S. 1881, and not upon section 2006.

The perjury is charged to have been committed in the making of an affidavit for a continuance of a cause, in which appellee was defendant, pending before a justice of the peace. This was not a voluntary affidavit, in the sense of section 2007, but was a matter in which, by law, an oath was required, and hence the case falls within the provisions of section 2006, R. S. 1881. Under this section, the holdings have been that it must appear by a specific averment, or by the statement of

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the facts in the indictment, that the swearing was touching matters material to the point in question. *Weathers v. State*, 2 Blackf. 278; *State v. Hall*, 7 Blackf. 25; *State v. Johnson*, 7 Blackf. 49. In the last case, it was held also that it is perjury to swear falsely to a material point in an affidavit for the continuance of a cause. *Hendricks v. State*, 26 Ind. 493; *Galloway v. State*, 29 Ind. 442; *State v. McCormick*, 52 Ind. 169. See, also, 2 Bishop Crim. Proc., section 921; *State v. Flagg*, 25 Ind. 243.

In the last case, the perjury was predicated upon an affidavit, the purpose of which was to procure a continuance. Citing the cases of *State v. Hall*, *supra*, and *State v. Johnson*, *supra*, it was said: "The materiality of the allegations must be shown either upon the face of the indictment, or expressly averred." The question was made in that case that it fell within the provisions of section 41, 2 G. & H., p. 451, which is the same as section 41, 2 R. S. 1876, p. 444, and section 2007, R. S. 1881, and that hence it was not necessary that the swearing should appear to have been touching matters material to the point in question. In answer to this contention it was said: "It might perhaps be sufficient to say that the same section" (41) "of the statute was in force when the decisions already cited" (7 Blackf. 25 and 49) "were made by this court. * * * The distinction between the two sections is this: the 40th section" (section 2006, R. S. 1881) "is confined to cases where the oath or affirmation has been made 'in any matter in which by law an oath or affirmation may be required,' and under that section the false statement must be 'touching a matter material to the point in question.' The 41st section" (section 2007, R. S. 1881), "on the other hand, includes all cases where an oath not being required to the 'certificate, affidavit or statement,' the person nevertheless voluntarily makes such oath or affirmation. Where the law itself requires an oath or affirmation to be appended to any instrument, to render the same effectual, it will not hold the party making the affidavit guilty of perjury, by reason of any misstatement of facts, unless those facts

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are material to the point involved. But where no such oath or affirmation is required to the instrument or statement, if the party making the same voluntarily makes a false oath or affirmation thereto, he shall be held liable, although such statement may not be of a matter material to the question involved." The holding was, that as an oath is required to an application for a continuance to render it effectual, it is a matter in which, by law, an oath is required, and falls within section 40, 2 G. & H., p. 450; section 40, 2 R. S. 1876, p. 443; section 2006, R. S. 1881, in which case the materiality must be shown, either by a specific averment or by a statement of the facts.

In the case of *State v. Flagg*, 27 Ind. 24, an affidavit was filed with interrogatories for the purpose of procuring a continuance. It was said: "The indictment in this case alleges that the interrogatories and affidavit were filed for the purpose of procuring a continuance. It was therefore an affidavit required by law, and if false, and wilfully and corruptly made, as the indictment charged, was clearly within the statutory definition of perjury." It was held that the materiality of the facts stated in the affidavit must be shown.

Under these decisions, the affidavit for a continuance, upon which, in the case before us, perjury is predicated, is an affidavit required by law, and hence the materiality must appear from the facts stated, or by an express allegation in the indictment, if such an allegation is the proper mode of showing it under our criminal practice. See *Burk v. State*, 81 Ind. 128.

In the indictment before us, there is no allegation of the materiality of the facts stated in the affidavit. Unless, therefore, the facts stated in the affidavit themselves show their materiality, the indictment is bad. It can not be determined that the facts so stated are material, without a knowledge of the character of the case in which the affidavit was filed. All that is stated in the indictment as to the nature of that case is, that it was a certain civil action, pending before the jus-

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tice of the peace, wherein the State, on the relation of Ella Walker, was plaintiff, and appellee was defendant. It is said in argument, that the case was a bastardy proceeding, but that does not appear from anything in the indictment. Presumptions and inferences can not take the place of allegations in an indictment. If these were to be indulged, it might as well be presumed or inferred that Ella Walker was the relatrix in an action upon an official bond, as that she was the relatrix in a bastardy proceeding. If the case was any other than a bastardy proceeding, it is impossible to see how the affidavit or the facts therein stated were material for any purpose. The nature of the case is not shown, and hence it is not shown that either the affidavit or the facts stated therein were material for any purpose. The indictment is, therefore, bad. The court below held it bad, and sustained the motion to quash. That ruling, therefore, must be sustained, whether it was placed upon the grounds upon which this decision rests or not.

Judgment affirmed.

Filed Sept. 26, 1885.

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No. 11,683.

HENRY v. GILLILAND.

PROMISSORY NOTE.—*Not Payable in Bank.*—*Action by Assignee.*—*Defence by Maker, of Breach of Warranty by Payee.*—*Answer.*—In an action by the assignee of a note not payable in bank against the maker, an answer that the consideration of the note was part of the purchase-price of real estate, conveyed to the maker by the payee, with full covenants of warranty; that to protect his title he had been compelled to buy in the real estate at a sheriff's sale made in satisfaction of a judgment against the payee, which was a lien on the property at the time of his purchase; that the amount so paid was greater than the balance due on the note, and that the payee was insolvent, is good.

SAME.—*Forbearance to Sue.*—*Estoppel.*—Where the holder of such promissory note gratuitously permits it to run more than a year after maturity, and

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then, upon the payment of a part of it by the maker, the holder, at the request of the maker, and without losing any right or changing his situation, agrees to wait until the latter can collect money with which to discharge the balance, such maker is not estopped to set up a defence then existing, or which might thereafter arise, of which neither such maker nor the holder had notice at the time of such agreement.

SAME.—*Extension Must be for Definite Time and on Valid Consideration.*—*Performance.*—To defeat the right to a clear defence to a note, not payable in bank, in the hands of an assignee, on the ground of a subsequent contract to pay in consideration of an extension of time, the plaintiff must show a contract of extension for a definite time, upon a valid consideration. Performance of his part is not sufficient to bind the maker.

From the Montgomery Circuit Court.

A. Thomson and T. H. Ristine, for appellant.

M. W. Bruner, for appellee.

MITCHELL, C. J.—This suit was brought by Gilliland against Henry to recover the amount remaining due on a promissory note, executed by Henry to one Coons, and by him assigned to the plaintiff before maturity. The note was not commercial paper.

The defendant answered specially, that the consideration of the note was part of the purchase-price of certain real estate conveyed to him by the payee by deed containing full covenants of warranty; that at the time of the conveyance the land was encumbered by the lien of a judgment in favor of Burbridge against Coons, and that, in order to protect his title, he had been compelled to buy in the land at a sheriff's sale, made in virtue of an execution against Coons, issued on the judgment mentioned, and that Coons was insolvent.

To this answer the plaintiff replied, that the note was assigned to him before maturity, and that he had no notice of the alleged defence; that after he took the assignment the defendant made two payments on the note, and at the date of the last, March 13th, 1878, had requested the plaintiff to give him more time, promising that if more time was given he would pay the balance as soon as he could collect certain debts due him.

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It is averred that in pursuance of this request and promise, the plaintiff "did agree to forbear to bring suit on said note, and agreed to wait on defendant, and did wait on defendant, until the first day of August, 1878, at about which time defendant informed plaintiff that he would not pay said note, as he had acquired a good defence to the same." It is further averred that at the time of this promise the defendant had no defence to the note, not having then paid off the encumbrance on the land, and that the agreement mentioned was the sole consideration for the plaintiff's forbearance.

Demurrers were overruled to the answer and reply respectively, and upon a special finding of facts, the court stated conclusions of law, sustaining a recovery of the balance of principal and interest due on the note.

The facts found are substantially as set up in the pleadings. By proper assignments of error and cross error, the rulings of the court on the demurrers to the answer and reply, and the conclusions of law upon the facts found, are challenged.

The objections urged against the answer are, that it does not appear from its averments whether the execution which was issued on the judgment against Coons was an execution against his person or his property, and that the amount of the judgment constituting the encumbrance is not set out. Neither of these objections is in our opinion tenable.

It is averred that the sheriff levied on the defendant's land to satisfy an execution in favor of Burbridge; that the execution was issued on a judgment against Coons, which constituted a lien on the land at the time the defendant made the purchase, and that he was compelled to buy it in to protect his title. From these averments the presumption is irresistible that the execution on which the land was sold was against the property, and not against the person, of Coons.

It is true, as contended, that the amount of the judgment is left blank, and while this may have been good ground for a motion to make the answer more specific, it was not ground for demurrer. Besides, it is averred in the answer that the

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amount which the defendant was compelled to pay in order to remove the encumbrance was more than the balance due on the note.

The reply presents a question of more difficulty. The note fell due January 10th, 1877. It was assigned, as appears from a copy filed with the complaint, February 3d, 1876, the assignment being coupled with an agreement that the assignor would "stand good until the same is paid."

The plaintiff had, so far as appears, gratuitously permitted the note to run until March 13th, 1878. At that time a payment was made, and the alleged agreement was entered into "to wait" until the defendant could collect money due him with which to discharge the balance. It does not appear that the holder was about to take any measures to collect the note, or that he changed his situation or plans in any respect on account of the alleged agreement. He was not put in any different attitude in respect of the liability of the assignor, who, under the terms of the contract of assignment, remained holden until the note was paid; nor does it appear that either he or the maker of the note had at that time any actual notice of the encumbrance then existing against his land, or that there was any intention to waive any defence then existing or which might afterwards arise to the note. It is clear that the facts averred did not constitute an estoppel. *Ray v. McMurry*, 20 Ind. 307.

The agreement to wait was for no definite time, was vague and uncertain in every aspect, and presented no obstacle whatever to the plaintiff's right to proceed at once to the enforcement of the note.

It is contended, however, that an agreement to forbear suit, although for no definite or certain time, is binding on the person in whose favor it is made, after it has been complied with by the other, and that the agreement set up in the reply constituted a new consideration, sufficient to warrant the enforcement of the note, notwithstanding the facts averred in the answer.

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In this connection *Jaqua v. Montgomery*, 33 Ind. 36 (5 Am. R. 168), and *Doherty v. Bell*, 55 Ind. 205, are relied on. The cases cited do not sustain the proposition to the extent contended for. While bearing some analogy to the case in hand, in both there was an agreement for an extension for a fixed time, and each contains other elements conspicuously absent in this. The decision in the case first cited was made to depend upon the consideration that by force of the agreement to forbear the holder of the note had surrendered or waived his right to proceed against the maker until the expiration of the time agreed upon, and had probably lost his remedy entirely against the assignor, and this was held by a divided court to be the surrender of such a right as constituted a sufficient consideration for the agreement to pay the note. We concur with the view maintained in the prevailing opinion in that case, solely on the ground that the agreement was for a definite time, and was fully executed. We are not, however, disposed to extend the doctrine of that case, so as to embrace an agreement so vague and indefinite as that here involved, especially where no apparent loss has resulted.

Having gratuitously permitted the note to run for a period of fourteen months after it fell due without any agreement, we are disposed to regard the indulgence extended after the alleged agreement as proceeding from the same motive that induced the previous lenity, and to attach to it the same consequences.

It can not be said that there was any contract which either required or induced an extension of time for any period. The agreement set up is a mere *nudum pactum*, which bound no one to anything, and it must be presumed both parties so regarded it.

To defeat the right to a clear defence to a note, not payable in bank, in the hands of an assignee, on the ground of a subsequent contract to pay in consideration of an extension of time, in analogy to all the rulings of this court, we think it

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is incumbent on the plaintiff to show a contract of extension for a definite time, founded upon a valid consideration. As was said by NIBLACK, C. J., in the case of *Holmes v. Boyd*, 90 Ind. 332, "A contract for forbearance in suing upon a promissory note, or other similar instrument, in writing, after it has become a binding obligation upon the makers, must be upon some new consideration. This rule applies not only to cases in which the rights of sureties are affected, but extends to all contracts of that character. A distinct and adequate consideration is an essential requisite in all contracts of forbearance to sue."

It can not be said that a contract, under which the holder of a note agrees to nothing more than to "wait," without specifying any time or other consideration, and which leaves him as free to act after as before it was made, is founded on a "distinct and adequate consideration." By the terms of the contract, the plaintiff surrendered nothing of value to him, nor did the defendant thereby obtain any advantage. If the time was extended, the extension can not be referred to the contract; it was by the grace of the plaintiff, and not by force of the contract.

There is no doubt that a promise which is void at its inception, for want of mutuality, may be enforced after full performance by one party. But the performance must involve the doing of some act beneficial to the one or injurious to the other, and the thing done must be clearly referable to the contract, and must appear to have been done under it. *Willetts v. Sun M. Ins. Co.*, 45 N. Y. 45; S. C., 6 Am. R. 31.

The rule is settled in this State that an agreement for extension of time, in order to be binding and constitute a valid consideration for a promise, must be for a time certain. *Pra-ther v. Young*, 67 Ind. 480; *Starret v. Burkhalter*, 70 Ind. 285; *Abel v. Alexander*, 45 Ind. 523; S. C., 15 Am. R. 270.

There is nothing in *Doherty v. Bell*, *supra*, in conflict with what is here decided. That case decides nothing more than that the maker of a note may, in consideration of an agree-

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ment for extension for a definite time, waive objections to the manner of its execution. *St. John v. Hendrickson*, 81 Ind. 350.

The demurrer to the reply should have been sustained, and for the error in overruling it the judgment is reversed, with costs.

Filed Oct. 6, 1885.

No. 11,959.

THE LOUISVILLE, EVANSVILLE AND ST. LOUIS RAILWAY
COMPANY v. PAYNE ET AL.

REPLEVIN.—Complaint.—Affidavit.—Practice.—In actions for the possession of personal property, the complaint, if it contains the statutory requisites and is verified, may subserve the two-fold purpose of complaint and affidavit, and its sufficiency as a cause of action may be tested by demurrer, and as an affidavit by motion to quash the order or writ issued thereon.

SAME.—Detention.—An affidavit for the possession of personal property which alleges that the property is *wrongfully*, instead of *unlawfully*, detained, as required by the statute, and does not charge that the detention is by the defendant, seems to be bad.

SAME.—Property Held Under Execution.—Exemption.—An execution defendant can not maintain an action for the recovery of personal property held under the execution, except where the property is, by statute, exempt from execution.

SAME.—Void Execution and Judgment.—Pleading.—A naked averment in the complaint, without more, that the execution and judgment are void, is a mere conclusion.

From the Dubois Circuit Court.

H. S. Downey and *O. A. Trippett*, for appellant.

Howk, J.—The only error assigned by the appellant, the plaintiff below, upon the record of this cause, is the decision of the court in sustaining the separate demurrers of the appellees for the alleged want of facts, to its complaint.

In its complaint, the appellant alleged that it was the owner,

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and lawfully entitled to the possession, of certain described personal property; that such personal property had not been taken for a tax, assessment or fine pursuant to any statute, or seized under an execution or attachment against the appellant's property; that such property had been wrongfully detained by the appellees, under color of an execution issued by R. M. Capehart, justice of the peace of Pike county, Indiana, in favor of appellee Payne and against the property of the appellant, which execution, and the judgment upon which it purports to have been issued, as appellant believed and charged, were absolutely void; that appellant estimated the value of such personal property at the sum of \$250; and that such property was detained at Velpen, in the county of Pike. Wherefore, etc.

The question for our decision is this: Does the appellant's complaint state sufficient facts to constitute a cause of action? Or, in other words, does the complaint show by its allegations of facts, that the possession of appellant's personal property was, in the language of the statute, "unlawfully detained" by the appellees? Section 1266, R. S. 1881, provides as follows: "When any personal goods are wrongfully taken, or unlawfully detained, from the owner or person claiming the possession thereof, or, when taken on execution or attachment, are claimed by any person other than the defendant, the owner or claimant may bring an action for the possession thereof."

In this case the appellant claimed the delivery of the property, and its complaint was prepared so that when verified, as it was, it would also serve for the affidavit required in such case by section 1267, R. S. 1881. In that section of the code it is provided that such an affidavit must show:

"*First.* That the plaintiff is the owner of the property, or that he is then lawfully entitled to the possession thereof, and particularly describe it.

"*Second.* That the same has not been taken for a tax, assessment, or fine, pursuant to a statute; or seized under an

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execution or attachment against the property of the plaintiff, or, if so seized, that it is, by statute, exempt from such seizure.

"*Third.* That the property has been wrongfully taken and is unlawfully detained by the defendant, or is unlawfully detained.

"*Fourth.* The estimated value of the property, and in what county the same is believed to be detained."

It has been held by this court, and correctly so we think, that in actions for the possession of personal property, the plaintiff's complaint, if it contains the statutory requisites of an affidavit to obtain an order for the delivery of the property, and if it be verified, may subserve the two-fold purpose of complaint and affidavit. *Cox v. Albert*, 78 Ind. 241. But, of course, the sufficiency of such verified complaint, as a cause of action, could be tested by demurrer, and, as an affidavit, by motion to quash the order or writ issued thereon. In the case in hand, we have given the substance of appellant's verified complaint, almost in the language of the pleader. It will be observed that the appellant has not alleged that its personal property was wrongfully taken or seized by the appellees; but it has attempted to charge them with the unlawful detention of its property as its sole cause of action. The detention of its property is twice alleged in the complaint, and, as the language used by the pleader is peculiar at least, we will quote it literally. The first allegation is as follows: "That the said property has been wrongfully detained by the defendants," etc. The second allegation of the complaint, in regard to the detention of the property, is in these words: "And that the same is detained at Velpen, in the county of Pike."

This second allegation is clearly insufficient, for two reasons: 1. Because it is not alleged that the property was *unlawfully* detained; and, 2. Because it does not charge that the property was detained by the appellees in any manner.

We return to the first allegation above quoted. It charged that the property "has been wrongfully detained," etc. The

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phrase "has been detained," grammatically considered, has reference solely to something done in the past. As used in the complaint, it does not mean that the property was detained, etc., at the time of the commencement of the action, and yet that is what ought to have been alleged in the complaint. The word "wrongfully" is improperly used in the first allegation above quoted. The statute provides, as we have seen, that when personal goods are "wrongfully taken," or are "unlawfully detained," from the owner or claimant thereof, he may have his action for the possession of such goods. Throughout the statute, it will be observed that the word "wrongfully" is used to characterize the taking or seizure, and the word "unlawfully" is used to characterize the detention of personal goods, which would authorize the owner or claimant to maintain an action for the possession thereof. These words, "wrongfully" and "unlawfully," are not synonyms or the equivalents of each other; they are not convertible terms. This has been several times decided by this court in construing the language of another statute. *Board, etc., v. Armstrong*, 91 Ind. 528; *Durham v. Board, etc.*, 95 Ind. 182; *Board, etc., v. Murphy*, 100 Ind. 570.

Passing these objections to the first allegation above quoted, however, and conceding, but by no means deciding, that such allegation, if it had ended where our quotation ends, would have sufficiently shown the unlawful detention of appellant's property by the appellees, we prefer to quote, and rest our decision of this case upon the whole of the first allegation of the complaint in relation to the detention of the property. We quote literally as follows: "That the said property has been wrongfully detained by the defendants under color of an execution issued by R. M. Capehart, justice of the peace of Pike county, Indiana, in favor of said defendant Thomas E. Payne, and against the property of the Louisville, Evansville and St. Louis Railway Company, which execution, and the judgment upon which the same purports to have been issued, are, as plaintiff believes and charges, absolutely void."

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It sufficiently appears from this allegation of the complaint, that the plaintiff in this suit is the defendant in the execution issued by justice Capehart, under which the appellees hold and detain the possession of the property in controversy. Under the provisions of our code, the execution defendant can not maintain such an action as this for the recovery of the personal property held under the execution, except where the property is, by statute, exempt from execution, which is not claimed in this case. The averment in the complaint, that the execution and judgment are absolutely void, is merely the pleader's conclusion from facts which are not pleaded and are not apparent, and amounts to nothing. Even if the complaint had shown in strictly formal language, that at the commencement of this suit the property in controversy was unlawfully detained by the appellees, in Pike county, yet the specific statement of the complaint, in regard to the appellees' holding and detention of the property under the execution against the appellant, would overcome such formal allegation and show that, in fact and in law, the appellees' detention of the property was not unlawful. *Reynolds v. Copeland*, 71 Ind. 422; *State v. Wenzel*, 77 Ind. 428; *Ragsdale v. Mitchell*, 97 Ind. 458.

The demurrers to the complaint were correctly sustained.

The judgment is affirmed, with costs.

Filed Oct. 7, 1885.

No. 11,435.

DOUGLASS ET AL. v. THOMAS.

DEED.—Easement.—Right of Way.—Railroad.—Title.—A deed executed prior to May 6th, 1853, conveying to a railroad company "the right of way," of an undefined width, over certain real estate, such deed containing a stipulation that such company was to "have and hold the said rights and privileges to the use of said company so long as the same shall be required for the uses and purposes of said road," conveys nothing more

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than an easement in or right of way over the land, and not the fee simple.

SAME.—Encumbrance.—A right of way in favor of a railroad company constitutes an encumbrance on the land so occupied.

SAME.—Pleading.—Counter-Claim.—To an action to foreclose a mortgage given for the purchase-money of certain land, a counter-claim, alleging a failure of title, is not sustained by proof of the existence of an easement or right of way over the land.

From the Kosciusko Circuit Court.

C. Clemans, for appellants.

A. G. Woods, for appellee.

MITCHELL, C. J.—This was a proceeding by Thomas against Douglass and others to foreclose a mortgage.

The defendants pleaded by way of counter-claim, that the consideration of the note, mentioned in the complaint, was part of the purchase-price of the several parcels of land described in the mortgage, which land it was averred had been conveyed to the mortgagors by the mortgagee, by deed containing full covenants of warranty. It was averred that the purchase-price agreed to be paid for the land was \$1,200, and that it had all been paid except the amount covered by the note in suit, the principal of which was \$300.

The defendants then averred the following breach in the covenants of warranty contained in their deed: "That said plaintiff did not have title to said real estate; that as to the undivided one-half of lot three, block nine, of the above described tract of land, plaintiff had no title whatever when he made said conveyance to these defendants, but that the title thereof was in another party, to wit, the Pittsburgh, Fort Wayne and Chicago Railroad Company, and that neither these defendants nor the plaintiff herein have obtained title to said real estate since the making of said conveyance." It was averred further that the defendants "have wholly lost the undivided one-half of lot three, block nine," and that "it will cost \$450 to obtain a clear title to said real estate."

Upon issues made, there was a trial by a jury, resulting in

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a verdict and judgment, over a motion for a new trial, for the full amount of the note and interest.

The only error assigned and argued is, that the court erred in overruling the appellants' motion for a new trial. The conveyance from Thomas to the appellants was made on the 16th day of March, 1878.

It appeared in evidence that, in June, 1852, Lewis Keith, a remote grantor of Thomas, while owning the land in controversy, conveyed to the Fort Wayne and Chicago Railroad Company "the right of way," of an undefined width, over lot three, which was part of the land mortgaged. There was a stipulation in the deed that the railroad company was to "have and hold the said rights and privileges to the use of said company so long as the same shall be required for the uses and purposes of said road." It also appeared in evidence that the railroad company occupied with its tracks part of lot three.

At the proper time, after stating the issues, the court instructed the jury, in substance, that the defendants could not prevail on their counter-claim, as pleaded, unless the evidence established that, at the time Thomas conveyed to the appellants, he had no title to the land in dispute; saying to the jury, in substance, that the counter-claim pleaded did not proceed upon the theory that there was a lien or encumbrance on the land, but upon the assumption that there had been an entire failure of title, and that proof of a mere right of way over the land was not sufficient to sustain the counter-claim. The court also instructed the jury that the effect of the deed from Keith to the railroad company was to convey to it nothing more than a right of way over the land.

It is earnestly contended by the learned counsel for appellants, that in the instruction so given the court erred. It is by implication, at least, conceded, that if, by force of the deed from Keith to the railroad company, nothing but a right of way was granted, the instruction was right, but the contention of counsel is that the court below misconceived the

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force of the deed, and that, instead of a mere right of way, it conveyed a fee simple. It is claimed that the case of *Indianapolis, etc., R. W. Co. v. Rayl*, 69 Ind. 424, supports this conclusion. It was held in that case that an instrument conveying the right of way to the railroad company there concerned, supplemented by the 19th section of the act under which it was incorporated, did have that effect. The act of incorporation in that case, however, expressly provided that the right of way, when acquired, should be held in fee simple by the corporation. Prior to May 6th, 1853, there was no general law for the incorporation of railroads in force in Indiana, and as the deed from Keith was made in June, 1852, and as the record does not inform us concerning the nature of the charter of the Fort Wayne and Chicago Railroad Company, in respect of the estate which it should take in its right of way, we must construe the deed according to the terms employed in the instrument. From these it is clear that it conveys nothing more than an easement in or right of way over the land. This constituted an encumbrance on the land, and if there was any breach of the covenants, in the deed from Thomas to the appellants, it related to the covenant against encumbrances, and should have been so alleged in the counter-claim. *Burk v. Hill*, 48 Ind. 52. (17 Am. R. 731).

The averments in the appellants' counter-claim were, that the plaintiff, at the time the conveyance was made, had no title whatever to part of lot three, but that the title was in another. These averments were not proved by the deed from Keith to the railroad company, which tended to prove nothing more than that the title of Thomas was subject to an easement or right of way in favor of the railroad company. While the easement thus created, if followed by possession and continued occupancy and use by the railroad company, may have been the subject of a proper counter-claim to the extent of the damage resulting therefrom, it was not the one

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pleaded. *Boardman v. Griffin*, 52 Ind. 101; *Thomas v. Dale*, 86 Ind. 435; *City of Huntington v. Mendehhall*, 73 Ind. 460.

There was, therefore, no error in the instructions given by the court, and as what has been said concerning those given disposes of those refused, it results that the judgment must be affirmed, with costs.

Filed Oct. 7, 1885.

No. 12,052.

ROSA ET AL. v. PRATHER.

REVIEW OF JUDGMENT.—False Representations.—Excuse for Non-Appearance to Action.—In an action to review a judgment, it is not a reasonable excuse for not appearing to and defending the original action, that the plaintiff therein and his attorney assured the defendants therein, the present plaintiffs, that such action was only to recover the possession of the lands in suit, on which assurance they relied, where the original complaint averred that the plaintiff was the owner in fee and entitled to the possession of such lands; and the fact that the plaintiff therein, without actual notice to the defendants, filed a second paragraph of complaint, charging that certain deeds, under which defendants claimed title to said lands, were void, will not be ground for review.

SAME.—Statute of Limitation.—The statutory method provided for obtaining the review of a judgment is, by the terms of its creation, a special proceeding, to which the various statutes of limitation affecting other actions and proceedings have no application.

SAME.—Non-Residents.—No reservation in favor of non-residents is contained in sections 615 and 616, R. S. 1881, limiting the time for review of a judgment.

MARRIED WOMEN.—“Legal Disabilities.”—Coverture.—Married women are not persons “under legal disabilities” within the meaning of the statute, section 615, R. S. 1881; nor is coverture any longer a legal disability in this State except in special cases.

From the Warren Circuit Court.

J. McCabe and E. F. McCabe, for appellants.

NIBLACK, J.—On the 30th day of March, 1880, Henry Prather recovered a judgment in the Warren Circuit Court

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against Mary R. Rosa and her husband, Charles E. Rosa, and Phebe Wiles and her husband, Jacob Wiles, for the possession of certain described tracts of land in Warren county, and quieting his title to the same lands, upon the ground that the deeds upon which the said Mary and Phebe, respectively, based some claim to the lands, were fraudulent and void as against him, the said Prather.

In March, 1884, Mary R. Rosa, in conjunction with her husband, Charles E. Rosa, commenced this proceeding against Prather to review the judgment recovered by him as above. The complaint was in two paragraphs. The first charged that the Warren Circuit Court had no jurisdiction over the said Mary because she was at the time a minor under the age of twenty-one years; that said court had no jurisdiction over the subject-matter of the action; that the complaint did not state facts sufficient to constitute a cause of action, and that the judgment was void because of uncertainty in the description of the lands which it attempted to describe.

The second paragraph charged that when the original complaint was filed, it contained but one paragraph, which was only for the recovery of the possession of the land to which it had reference, and that some time after the action was commenced, both Prather and his attorney falsely assured Mrs. Rosa and her husband that the object of the action was only to recover the possession of the lands in suit; that relying upon such assurance Mrs. Rosa and her husband made no defence to the action, and suffered default to be taken against them; that after giving such assurance, and notwithstanding the same, Prather, before the cause came on to a trial, filed a second paragraph to his said original complaint, averring that certain deeds under which Mrs. Rosa and Mrs. Wiles, respectively, claimed to have some interest in the lands sought to be recovered, were fraudulent and void as against him, and demanding that his title be quieted against any claim under those deeds; that in consequence of the false assurance so given as above stated, by both Prather and his attorney,

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neither Mrs. Rosa nor her husband had any notice of the filing of said second paragraph of complaint in the original action, and never received any actual notice of the filing of the same until at and about the time of commencing this proceeding; that when process was served upon them, and ever since, both Mrs. Rosa and her husband were non-residents of this State, being in fact residents of Vermillion county, in the State of Illinois.

A demurrer was sustained to this second paragraph of the complaint for a review of the proceedings in the original action, and Prather answered: *First.* In general denial. *Second.* That the judgment complained of was not rendered within one year before the time of the commencement of this proceeding. *Third.* That said judgment was not rendered within three years before this proceeding was commenced. To the second and third paragraphs of this answer Mrs. Rosa and her husband replied: *First.* That Mrs. Rosa was, at the time of the rendition of the judgment sought to be reviewed, and had ever since continued to be, a married woman. *Second.* That at the time of the rendering of such judgment, Mrs. Rosa and her husband were, and continuously ever since had been, non-residents of the State, but had and still resided in the State of Illinois.

Demurrers were severally sustained to both paragraphs of the reply, and the plaintiffs in this proceeding declining to plead further, final judgment went against them upon demurrer.

Complaint is made in this court of the decision of the circuit court in sustaining a demurrer to the second paragraph of the complaint; also of the decision sustaining demurrers to both paragraphs of the reply.

No formal argument has been submitted by counsel for the appellants in support of the sufficiency of the second paragraph of the complaint, and we have no brief from the appellee. It may not be amiss, nevertheless, to remark that

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we can recall nothing which would justify us in holding that the circuit court erred in sustaining a demurrer to that paragraph.

Recurring to the first paragraph of the original complaint, a copy of which, with the rest of the record, duly certified, was filed with the complaint for review, we find that it averred that the appellee was the owner in fee simple, and entitled to the possession, of the lands sued for in that action. If, therefore, the appellants had, or claimed to have, any interest in those lands which they desired to have protected by the court, it was as necessary that they should appear and defend against the first paragraph of the original complaint, as it was that they should appear and defend against the claim of absolute title preferred by any other paragraph that might be thereafter filed. We are consequently unable to see that the alleged assurance given by the appellee and his attorney afforded the appellants any reasonable excuse for not appearing to and defending the original action.

Sections 615 and 616 of the code of 1881, containing provisions governing proceedings for the review of judgments, are as follows:

"615. Any person who is a party to any judgment, or the heirs, devisees, or personal representatives of a deceased party, may file in the court where such judgment is rendered a complaint for a review of the proceedings and judgment. Any person under legal disabilities may file such complaint at any time within one year after the disability is removed. But no complaint shall be filed for a review of a judgment of divorce.

"616. The complaint may be filed for any error of law appearing in the proceedings and judgment, within one year; or for material new matter, discovered since the rendition thereof, within three years; or for both causes, within one year after the rendition of the judgment, and without leave of court."

Section 1285, R. S. 1881, which assumes to define the meaning of certain words and phrases used in the statutes now in

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force in this State, enacts that "The phrase 'under legal disabilities' includes persons within the age of twenty-one years, or of unsound mind, or imprisoned in the State prison, or out of the United States."

It is claimed that as the common law recognized coverture as a legal disability, and as the common law is still in force in this State, except where it has been changed or modified by some statute, and as there is no statute in this State emancipating married women from all the disabilities of coverture, a married woman is still "under legal disabilities" within the meaning of section 615, *supra*, notwithstanding the failure of section 1285 to expressly refer to and to denominate coverture as a legal disability.

The three most notable respects in which the disability of coverture was felt at common law were, in the inability of the wife to sue, in her inability to enter into a contract, and in her inability to control her own property. These separate disabilities have all been, in general terms, removed by sections 254, 5115 and 5117 of our present revised statutes. Sections 5118, 5124, 5130 and 5131 are all promotive of the same general policy. See, also, *Wright v. Wright*, 97 Ind. 444.

The disabilities upon those and other subjects which still remain are special and exceptional, and no longer constitute a part of a category of general disabilities; hence it was, as we infer, that section 1285, herein above referred to, did not include married women in its definition of persons "under legal disabilities." For these reasons coverture is clearly not one of the disabilities to which section 615 of the present code has reference, and is no longer a full legal disability under the existing statutes of this State.

There is nothing in the case of *Buchanan v. Hubbard*, 96 Ind. 1, referred to by counsel, which really conflicts with the construction we have given to the various statutes to which we have alluded, and the construction thus given is seemingly supported by the case of *Richardson v. Pate*, 93 Ind. 423 (47 Am. R. 374).

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The statutory method provided for obtaining the review of a judgment is, from its very nature, as well as the terms of its creation, a special proceeding, to which the various statutes of limitations affecting other actions and proceedings have no application. The only limitations applicable to such a proceeding are contained in sections 615 and 616, above set out. No reservation in favor of non-residents of the State is contained in either one of those sections; hence such a reservation can not be inferred from statutes enacted with reference to other proceedings. Our conclusion necessarily is that the circuit court did not err in sustaining demurrers to both paragraphs of the reply.

The judgment is affirmed, with costs.

Filed Oct. 8, 1885.

No. 12,309.

CULLEN ET AL. v. THE TOWN OF CARTHAGE.

TOWN.—*Power to Employ Counsel to Defend Action Against Marshal.*—The board of trustees of a town in this State have incidental power to employ counsel to defend an action for false imprisonment brought against the town marshal by one arrested by him for the violation of a town ordinance, and a claim for services rendered under such employment may be enforced in an action against the town.

From the Rush Circuit Court.

W. A. Cullen, B. L. Smith and W. J. Henley, for appellants.

C. Cambern, T. J. Newkirk, J. Q. Thomas and J. J. Spann, for appellee.

ZOLLARS, J.—A demurrer was sustained below to appellants' complaint. That ruling is assigned as error. Counsel have discussed the question of the sufficiency of the complaint upon the assumption and concession that it makes this case, viz.: Oliver Wiltse was the marshal of the town of Carthage. One Drury Holt, in violation of the town ordi-

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nances, was drunk and disorderly, and made a serious and deadly assault upon Dr. Bogart, a peaceable and quiet citizen of the town. For this infraction of the ordinances, the marshal arrested him and placed him in the town prison. Holt afterwards brought a suit against the marshal for false imprisonment. The board of trustees of the town employed appellants as attorneys to defend the marshal in that action. This they did successfully, following the case through this court. *Wiltse v. Holt*, 95 Ind. 469.

The town now refuses to pay them for their services, upon the ground that the employment and contract by the board of trustees was *ultra vires* and void, and hence not binding upon the town. It is not necessary to decide as to whether or not a town marshal in this State is so far the agent or servant of the town that it will be liable for his negligence or torts. That question is not involved here.

If the employment by the board of trustees was *ultra vires*, and hence void, the town is not, and can not be estopped to make that defence at any time. In such a case, the fact that the services were rendered under the employment can avail appellants nothing. If the corporation were a private corporation, or if it were a case simply of an irregular exercise of power, the case would be different. *Driftwood, etc., T. P. Co. v. Board, etc.*, 72 Ind. 226.

The important question here is, was the contract of employment beyond the powers granted in the organic law of the corporation? One section of that act is as follows: "All moneys, however derived, belonging to such corporation, shall only be appropriated for such objects and defraying such expenses as accrue, or necessarily arise, in the exercise of powers granted by this act." R. S. 1881, section 3339.

It is settled that corporations, including municipal corporations, have the powers expressly granted, and such incidental power as may be necessary to carry out those expressly granted. The above section of the statute does not, we think, abridge this general rule, and does not inhibit the ap-

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appropriation of money to any purpose or object reasonably connected with or necessary to the powers granted.

The board of trustees have power to preserve peace and good order, and to prevent vice and immorality. To this end they have power to make and establish the necessary by-laws, ordinances and regulations, and fix fines, penalties and forfeitures for a violation thereof. R. S. 1881, section 3333, clauses 6 and 16, and section 3346. The marshal is to execute the orders of the trustees and enforce the by-laws and ordinances. R. S. 1881, section 3327.

Under the above sections, power is given to the trustees to accomplish one important object of the corporation, by preserving peace and good order, and preventing vice and immorality. In whatever will promote these very important ends the corporation is interested. Such an interest has been declared to be the test of authority. Dillon Mun. Corp., section 147, and cases there cited. It is upon this test that it has often been held that municipal corporations have power to indemnify their officers against liability which they may incur in the *bona fide* discharge of their duties, although the result may show that the officers have exceeded their legal authority. And upon the same test, and grounded upon the same reasons, it has been held also that the corporation may appropriate money to defend suits brought against its officers for acts done in good faith in the discharge of their official duties.

In the case of *Sherman v. Carr*, 8 R. I. 431, it was held that the city council might appropriate money to defend the mayor in an action for false imprisonment, based upon the ground that he had exceeded his authority. There was a limitation in the city charter very similar to the statute above set out, that the council should not have power to appropriate money, except for the regular, ordinary and usual expenses of the city.

This case, involving, as it does, a statute so similar to that involved in the case in hearing, is authority to support ap-

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pellants' claim and the interpretation we put upon our statute. See, also, to the same effect, *Briggs v. Whipple*, 6 Vt. 95; *Baker v. Inhabitants of Windham*, 13 Maine, 74; *Pike v. Middleton*, 12 N. H. 278; *State v. Council of the Town of Hammonton*, 9 Vroom, 430; S. C., 20 Am. R. 404.

In the case of *Fuller v. Inhabitants of Groton*, 11 Gray, 340, it was held that the town had power to appropriate money to defend a school committee against an action for libel, alleged to be contained in one of their reports to the town. Among other things it was said: "That towns have power to raise money to indemnify their officers against liabilities incurred or damages sustained in the *bona fide* discharge of their duties is now well settled." In support of this statement, the court cite *Nelson v. Milford*, 7 Pick. 18; *Bancroft v. Lynnfield*, 18 Pick. 566; *Hadsell v. Hancock*, 3 Gray, 526.

In passing upon the main question in the case before us, we have adopted the construction of the complaint placed upon it by counsel, and dispose of it upon the assumption that in arresting and imprisoning Holt, the marshal was engaged in an effort to enforce an ordinance of the town, and to thus preserve peace and order. That the ordinances should be thus enforced, and that peace and order should be preserved, are matters in which the town is interested. Under the cases already cited, it would seem to be clear that the board of trustees might have indemnified the marshal against liability in his efforts to thus enforce the ordinances and preserve peace and order.

One of the essential things in the enforcement of laws and the conservation of the peace and quiet of a community is, that the people shall have that respect for the constituted authorities that arises out of a common understanding that the laws will be rigidly executed.

In every community there is a greater or less number of people who yield obedience to the law, and respect the rights of others, simply because they fear the consequences of an opposite course. It is necessary that such shall be made to

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understand that the laws will be executed, and that the executive officers will be sustained in their efforts to execute them. If it should be understood that the marshal of the town is left without support from the governing body, to defend himself against all manner of suits that might be instituted against him, the vicious and violent might, by a succession of annoying suits against him, greatly cripple the enforcement of the ordinances. Such an understanding would, at least, have a tendency to embolden the vicious and intimidate the marshal. Upon these considerations and others that might be urged, and upon an examination of the whole case, we think that the town had such an interest in the result of the suit against the marshal as authorized the board of trustees to employ appellants to make the defence. The board of trustees having such authority, and the services having been rendered in good faith under the employment, it is too late now for the town to refuse to pay for the services. Whether or not such employments shall be made in any particular case, of course, will rest in the sound discretion of the board of trustees.

In dealing with the complaint, we have, as before stated, adopted the construction placed upon it by counsel. Upon that construction it is sufficient, and makes a case in favor of appellants against the town, and the court below erred in sustaining the demurrer. The judgment is reversed at the costs of appellee.

We suggest that, before trial, the complaint ought to be made more certain and specific.

Filed Oct. 8, 1885.

No. 11,861.

THE INDIANA, BLOOMINGTON AND WESTERN RAILWAY
COMPANY v. MADDY.

SUPREME COURT.—*Complaint.*—*Assignment of Error.*—A question as to the sufficiency of a complaint will not be considered by the Supreme Court unless properly presented by an assignment of error.

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ATTORNEY AND CLIENT.—*Authority of Attorney to Appear.*—Under section 970, R. S. 1881, an attorney may, at the proper time, be required to produce and prove the authority under which he appears, but his authority to appear can not be controverted on the trial by evidence outside the issues in the cause.

From the Henry Circuit Court.

C. W. Fairbanks, for appellant.

L. P. Mitchell, for appellee.

HOWK, J.—In this case, the appellee, Maddy, sued the appellant, the Indiana, Bloomington and Western Railway Company, and one George May, in a complaint of a single paragraph. In his complaint appellee alleged that in the month of July, 1882 (but the day of such month he was unable to state), the appellant, at said county, unlawfully and wrongfully took and carried away, and converted to its own use, three hundred railroad ties then and there the property of appellee and the defendant George May, and of the value of \$110, and to the damage of appellee and defendant George May in the sum of \$110; that afterwards (appellee was unable to state the time) the defendant George May, for a valuable consideration, sold and conveyed all his right, title and interest, in and to such railroad ties, to the appellee, and that George May was made a defendant in this suit to answer as to what, if any, interest he might have therein. Wherefore, etc.

The appellant and the defendant George May separately answered the appellee's complaint by general denials thereof. The issues joined were tried by a jury, and a verdict was returned for the appellee, assessing his damages in the sum of \$108, and over the appellant's motion for a new trial judgment was rendered on the verdict.

In this court, the only error properly assigned by the appellant is the overruling of its motion for a new trial.

The learned counsel for the appellant has ably and elaborately discussed the question of the sufficiency of appellee's complaint. This question is not before us. It is true, that

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appellant's demurrer to appellee's complaint, for the alleged insufficiency of the facts therein to constitute a cause of action, was overruled by the court. But it is also true, that this ruling is not one of the errors of which the appellant complains in his assignment of errors. In this court, the appellant's assignment of errors constitutes his complaint, and to it alone is the appellee required to answer. It is the foundation of the appellant's proceedings here for the review and reversal of the judgment below; and we have often held that we can neither consider nor decide any question which is not fairly presented by the assignment of errors. *Hutts v. Hutts*, 62 Ind. 214; *Williams v. Riley*, 88 Ind. 290; *Hartlep v. Cole*, 94 Ind. 513.

Under the alleged error of the court in overruling appellant's motion for a new trial, the only points made by its counsel are, that the court erred in excluding evidence to prove that its co-defendant May had no knowledge that this suit was brought, that he was in Missouri and was there long before the commencement of this suit, that Mr. Perdiew had no authority to appear for May in this case, and did not appear therein at the instance or request of May. This offered evidence was wholly foreign to the issues in this cause, and there was no error in excluding it from the jury. If the appellant had reasonable grounds to question Mr. Perdiew's authority to appear for May, it might at the proper time, under the provisions of section 970, R. S. 1881, have required him to produce and prove the authority under which he appeared. This not having been done, the authority of Mr. Perdiew to appear for May must be presumed, and can not be controverted on the trial by evidence outside of the issues in the cause. *McConnell v. Brown*, 40 Ind. 384.

The judgment is affirmed, with costs.

Filed Oct. 8, 1885.

Hedderich v. Smith.

No. 11,583.

HEDDERICH v. SMITH.

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LANDLORD AND TENANT.—*Right of Tenant to Remove Buildings Erected by Him.*—A tenant who, for the better enjoyment of the premises, erects buildings thereon, may remove them at any time before his tenancy ceases, if the removal can be accomplished without permanent injury to the freehold.

SAME.—*Failure to Remove During Tenancy.*—Where a tenant, while rightfully in possession, neglects to remove buildings erected by him, he is presumed to have abandoned them, unless his right to remove them afterwards is reserved by agreement with the landlord.

SAME.—*Accepting New Lease Without Reserving Fixtures.*—*Weiser.*—Although a tenant continues in possession after the expiration of his original term, yet, if he holds under a new lease, in which no provision for the removal of the fixtures is made, he is treated as having abandoned his right thereto.

From the Marion Superior Court.

B. F. Davis and *S. A. Forkner*, for appellant.

T. S. Rollins, for appellee.

MITCHELL, C. J.—Elizabeth D. Smith, as owner of certain premises in the city of Indianapolis, brought this suit against Hedderich, who was in possession, to restrain him from removing therefrom a "club-house" which had been erected thereon, and other alleged fixtures, which it was claimed were a part of the freehold.

The case was put at issue and tried by the court, the result being a finding and judgment for the plaintiff below.

On appeal to the general term, the only error assigned was that the court at special term erred in overruling the appellant's motion for a new trial. Under the settled practice, no alleged errors will be considered here except such as were assigned at the general term. *Miller v. State, ex rel.*, 61 Ind. 503.

It is a question whether the bill of exceptions containing the evidence is certified by the judge in such manner as to entitle it to consideration here, but, waiving the alleged irreg-

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ularities in that regard, we find the following undisputed facts exhibited in the evidence:

The plaintiff took title to the premises from her deceased husband, Ebenezer Smith. The place was known as "Volk's Garden," and had upon it one building which was used as a saloon, and another called the "club-house." The club-house was built by one Baldus while occupying as tenant of Smith. In April, 1879, Hedderich, with the knowledge and consent of Smith, purchased the club-house and fixtures of Baldus, paying therefor seven hundred dollars in cash. Contemporaneously with the purchase from Baldus, he took a lease of the premises from Smith for a term of three years. Whether by the terms of this lease the right to remove the property in dispute was reserved, does not appear. During the continuance of this lease Smith died, and his widow succeeded to his title.

At the expiration of the term, Hedderich leased the premises from Mrs. Smith for a term of one year, at a stipulated rent, payable monthly. The rent reserved for the new term was different from the old. The lease contained the usual covenants for repair by the tenant, and for the surrender of the premises at the expiration of the term without waste. There is in it no reservation of a right to remove any building or fixtures annexed to, or situate upon, the land. Some repairs and alterations were made to the club-room by the tenant during his term, and he asserted the right to remove it and the fixtures which he had purchased from Baldus. Whether the building was so annexed to the freehold as to become part of it, or whether it could be removed without injury to the reversion, were propositions asserted on one hand and denied on the other, but as the finding of the court was for the plaintiff, it must be assumed here that it was so annexed.

That a tenant who, for the better enjoyment of the leasehold, erects thereon buildings, may, at any time before his right of enjoyment ceases, remove such buildings if the re-

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moval can be accomplished without permanent injury to the freehold, is well settled. It is equally well settled that if he neglects to remove them during his rightful continuance in possession, unless his right to do so afterwards is reserved by agreement with the landlord, he is presumed to have abandoned them, and his right ceases. *Cromie v. Hoover*, 40 Ind. 49; *Allen v. Kennedy*, 40 Ind. 142; *Hamilton v. Huntley*, 78 Ind. 521 (41 Am. R. 593); *Griffin v. Ransdell*, 71 Ind. 440.

Assuming that the tenant had the right to remove the building and fixtures during the continuance of his first term, the question still remains, what was the effect of his taking a new lease upon different terms from Mrs. Smith, without reserving any right of removal?

Without question, if there had been nothing more than an extension of the old lease upon the same terms, the respective rights of the parties would have remained the same. The acceptance of a new lease upon different terms was, however, the creation of a new tenancy. It would seem that when the new lease was made, it was a lease of the whole estate as it then existed, including the club-house now in dispute, with whatever else was a part of the freehold. This estate the lessee covenanted to maintain in repair, and at the expiration of his term surrender up. It results from the terms of the lease, that whatever constituted a part of the freehold at the time the lease was accepted must be surrendered at its termination, and the lessee will not be permitted to say that part of the premises leased was in fact a trade fixture, erected by him under a previous lease, and that he has the right, against the face of his contract, to sever and remove it. To permit the tenant to do this would, in effect, be to permit him to deny the title of his landlord to part of the demised premises; and if he may deny his title to a part, why not to the whole? The acceptance of the new lease was an effectual surrender of the old, together with the estate and all other rights which the old lease secured to him. Thenceforth he was in as of a new estate, which is to be measured by the condition of things

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existing when it commenced, and by the covenants, conditions and reservations contained in the new lease, from which the rights of the parties must be determined and regulated.

Upon this subject the elementary writers are agreed. Accordingly, the rule is stated by an approved author thus: "But, while a tenant may remove a trade fixture at any time during his original term, or any renewal thereof, yet, although he continues in possession after the expiration of his original term, *if he holds under a new lease, in which no provision for the removal of the fixtures is made*, he is treated as having abandoned his right thereto." Wood Landlord and Tenant, section 532. So, also, in Taylor Landlord and Tenant, section 552, the author says: "If a tenant, at the close of his term, renews his lease, or surrenders it, for the purpose of acquiring a fresh interest in the premises, he should take care to reserve his right to remove such fixtures, as he had a right to sever under the old tenancy. For where his continuance in possession is under a new lease or agreement, his right to remove fixtures is determined, and he is in the same situation, as if the landlord, being seized of the land together with the fixtures, had demised both to him."

The principles above stated are sustained by the adjudications of the courts in the following, among other, well considered cases: *Loughran v. Ross*, 45 N. Y. 792 (6 Am. R. 173); *Watriss v. First Nat'l Bank, etc.*, 124 Mass. 571 (26 Am. R. 694); *Jungerman v. Bovee*, 19 Cal. 354.

It results that the judgment of the Marion Superior Court was right, and it is accordingly affirmed, with costs.

Filed Sept. 25, 1885.

No. 12,090.

THE CITY OF EVANSVILLE v. MARTIN ET AL.

SUPREME COURT.—*Objections to Pleadings.—Practice.—General Rule.*—It is the rule that if the sufficiency of a pleading is not questioned in the trial court, it can not be assailed on appeal.

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SAME.—Statutory Exception.—Complaint.—An objection may be made to a complaint for the first time in the Supreme Court only because the statute so provides.

SAME.—Answer Must be Objected to in Trial Court.—The sufficiency of an answer can not be questioned for the first time by an assignment of error in the Supreme Court.

NEW TRIAL.—Motion for After Term.—A motion for a new trial made after the term can not be considered where it appears that there was no agreement or order of court extending the time for filing the motion, and that the finding was not made on the last day of the term.

From the Vanderburgh Circuit Court.

S. B. Vance, J. S. Buchanan, C. Buchanan, H. C. Gooding and J. B. Rucker, for appellant.

A. Gilchrist, C. A. DeBruler and C. H. Butterfield, for appellees.

ELLIOTT, J.—The appellant assigns for error that "The court erred in not rendering judgment for the plaintiff, because the answers of the defendants are not sufficient to constitute a cause of defence to its complaint."

There was no motion for judgment *non obstante veredicto*, nor was there any motion for a judgment on the pleadings in the court below. Here, for the first time, the answer is assailed. There was no attack upon it in the trial court in any form, nor was there any exception to any ruling of the court which involved the question of its sufficiency. Notwithstanding the fact that there was no attack upon the answer in the trial court and no exception in the record to any ruling involving its validity, the appellant contends that its validity may be tested and determined on appeal. With great force of argument and a strong array of authority, counsel for the appellees contest this position.

The current of our decisions has been steadily in favor of the rule that if a pleading is not challenged in some appropriate method in the trial court, it can not be successfully assailed on appeal. This general rule was applied to complaints and prevailed until changed by an express and positive statute. *Johnson v. Stebbins*, 5 Ind. 364; *Menifee v.*

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Clark, 35 Ind. 304; *Newhouse v. Miller*, 35 Ind. 463; *Hannum v. State*, 38 Ind. 32. The rule has been almost, if not quite, uniformly applied to answers, for the reason that there is no statute permitting such pleadings to be primarily and directly attacked in the assignment of errors. *Roback v. Powell*, 36 Ind. 515; *Snyder v. Snyder*, 50 Ind. 492; *Campbell v. Coon*, 61 Ind. 516; *Crowder v. Reed*, 80 Ind. 1, *vide* p. 6; *Shordan v. Kyler*, 87 Ind. 38. It is contended by the appellant's counsel that these decisions were made upon a former code, and are not applicable to the present code. The only difference in the two codes is, that the present omits from section 346 the words, "unless the objection be taken by demurrer, it shall be deemed to be waived," which were embodied in section 64 of our former code. We can not concur with counsel in this view. The omission of these words worked no radical change, for, without them, the failure to test the answer in the trial court, in some appropriate method, precluded the plaintiff from making the question of the sufficiency of the answer on appeal for the first time. The spirit of the code, rather than any mere form of words, supported the rule laid down by former decisions, that the failure to attack the answer in the trial court precluded the appellant from assailing it for the first time in this court. In cases far too numerous for citation, extending from the earliest to the latest decisions upon the code practice, it has been held that exceptions to the ruling of the trial court must appear in the record, or this court can not review and reverse its judgment. Time and again has this doctrine been affirmed and in no uncertain terms. The ruling principle of the code is that parties must, except in the single exception of an attack upon the complaint, make their questions in the trial court and reserve timely exceptions. In almost every conceivable shape, the question of what rulings can be reviewed where no exception is reserved has been presented, and it has been invariably ruled that where there is no exception there can be no review, save only in the solitary exception made by

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the statute. Of the great number of cases illustrating and enforcing our proposition we cite but a few. *Cupp v. Campbell*, post, p. 213; *Wales v. Miner*, 89 Ind. 118, see p. 122; *Martindale v. Price*, 14 Ind. 115; *Davis v. Engler*, 18 Ind. 312; *Sutherland v. Venard*, 32 Ind. 483; *Shirts v. Irons*, 28 Ind. 458; *Train v. Gridley*, 36 Ind. 241; *Trentman v. Eldridge*, 98 Ind. 525, p. 527; *Buchanan v. Berkshire L. Ins. Co.*, 96 Ind. 510; *Standley v. Northwestern M. L. Ins. Co.*, 95 Ind. 254; *Scheible v. Slagle*, 89 Ind. 323; *Fisher v. Purdue*, 48 Ind. 323; *Roush v. Emerick*, 80 Ind. 551; *Hauser v. Roth*, 37 Ind. 89. In the case of *Standley v. Northwestern M. L. Ins. Co.*, supra, we said: "Our statute is very careful to require that parties who desire to save a question upon a ruling must reserve an exception, and in a very great variety of cases the court has given this statute full and strict effect. There is good reason for the rule. The trial court and the adverse party should be informed that the ruling is to be contested, and the appellate court should be enabled to see from the record what rulings were contested in the trial court. Again, parties ought not to be allowed to shift ground and contest in the Supreme Court points not regularly contested in the lower." It was said in *Indianapolis, etc., R. R. Co. v. Petty*, 30 Ind. 261, that "The code has very little toleration for the practice of concealing questions from the lower courts with a view to make them available upon vexatious appeals." In one of the earliest of our code cases it was said of one of the sections of the code: "It but inculcates, as does the whole code, that fair, honorable practice which apprises the judge and the opposite party, specifically, on what the party intends to rely in the appellate court; and that too while there may yet be time, if need be, to retrace their steps." *Zehnor v. Beard*, 8 Ind. 96. From the earliest to the latest decisions the rule has been, even in criminal prosecutions, that exceptions must be reserved. *Hornberger v. State*, 5 Ind. 300.

The rule so strongly declared by our cases stands on solid
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principle. Not only is it just to the parties and the trial court to require a party deeming himself aggrieved to make known at the earliest practicable moment his objections to rulings and his intention to bring them in review, on appeal, but it is also demanded by the public interests that he should do so, for such a practice enables the trial court to correct its errors, and thus prevent the expense and vexation of an appeal. Nor is the slightest injustice done to a plaintiff by the rule. He has ample opportunity to make known his objections, and abundant means of reserving all questions, and if he neglects to avail himself of the opportunity and means placed before him, it is his folly, and he has no just cause of complaint; if the purpose of failing to make his objections known to the trial court is to conceal them and make them available on appeal after he has taken the chance of a favorable decision, his course is far from commendable.

If we should hold that an objection to an answer may be made for the first time in this court, we should break down the wise provision of our code requiring exceptions to be reserved, and not only would this be the result of such a holding, but great and almost incurable evil would ensue from the confusion that such a holding would produce. It is the general rule that if an exception is not reserved to a ruling of the trial court, no question is presented on appeal, and to hold that an answer may be here assailed for the first time would produce a conflict that would result in disastrous confusion and destroy the consistency and harmony of our decisions, and break down the rules the code was intended to establish.

The appellant had at least two methods of testing the sufficiency of the answer in the trial court, by demurrer and by motion for judgment on the pleadings. This latter motion, in effect, is a motion for a judgment notwithstanding the verdict, and if counsel are right in their position that the answer is bad, this motion, followed by a proper exception, would have secured their client relief. It is not the fault of the trial court, nor of the adverse parties, that the appellant neglected

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to employ the remedies given by law; it was, in truth, the appellant's own fault, and it surely can not reap any advantage from that fault. The law does not favor those who sleep upon their rights.

The cases of *Western Union Tel. Co. v. Fenton*, 52 Ind. 1, and *McCloskey v. Indianapolis, etc., Co.*, 67 Ind. 86 (33 Am. R. 76), fully support our conclusion that the words omitted from the code of 1852 by the revision of 1881 were not of controlling importance. These cases declared that other provisions of the code of a more material and definite character controlled the subject, and that the clause referred to was ineffective. It is but reasonable to presume that for the reasons given in the cases cited the clause was dropped in the last revision of the code.

These decisions establish the doctrine that the trial court may disregard an immaterial answer, but they place this doctrine upon the provisions of the statute authorizing a judgment upon the pleadings and upon those authorizing a judgment notwithstanding the verdict. They hold that it is the duty of the trial court to find upon the evidence according to the law of the case, irrespective of an immaterial issue; but they do not hold that where the defendant succeeds the plaintiff may attack the answer for the first time on appeal. It is not difficult to perceive the difference between these cases and the one in hand. In those cases the plaintiff did not attack the answer, but did attack the finding upon the evidence; while here the attack is directed entirely against the answer. Here the grievance alleged is that the answer is bad, not that the court disregarded an immaterial answer. That we are not mistaken in the view we have taken of these cases, is evident from the following extract which we make from the opinion in *Western Union Tel. Co. v. Fenton*, *supra*: "But it is claimed by counsel for the appellant that, conceding the paragraph of answer to have been bad, inasmuch as no demurrer was filed to it, but issue was taken on it, and it was proved to have been true in point of fact on the trial, the

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court should have found for the defendant, and, therefore, that a new trial should have been granted. The statute provides that 'unless the objection' (to an answer) 'be taken by demurrer, it shall be deemed to be waived.' 2 G. & H. 92, sec. 64. And it is claimed that, as objections to the answer are deemed to be waived, it is to be regarded as good, and as it was proved to be true in point of fact, the defendant was entitled to a finding and judgment in its favor. The above provision of the code, however, is very much modified, if not completely abrogated, by a subsequent one, as follows: 'Where upon the statements in the pleadings one party is entitled by law to judgment in his favor, judgment shall be so rendered by the court, though a verdict has been found against such party.' 2 G. & H. 218, section 372. If the two sections can not stand together, the latter must prevail over the former. Supposing the paragraph in question had been the only one pleaded to the complaint, thus confessing the complaint, but setting up matter in avoidance, that is no defence whatever to the action. Notwithstanding a verdict might have been found for the defendant on the issue joined on the answer, the plaintiff would have been entitled to judgment on the pleading, because his complaint would have stood confessed, and no valid matter set up in bar of it. This result, however, could not follow, if no objection could be urged to the answer, and if it is to be taken as conclusively good in point of law, because no objection was made to it by demurrer. Now, if a verdict in favor of a defendant on an immaterial issue, thus tendered, would not entitle him to judgment, we think it could not be error on the part of the court trying the cause, as was evidently done in this case, to disregard the issue, and find for the plaintiff, although the immaterial facts thus alleged by the defendant might be proved. *Freitag v. Burke*, 45 Ind. 38."

In the reply brief of the appellant's counsel it is said: "And the proposition on which we rest here is, that this provision having been repealed by the revision of 1881, there is neither rule nor reason why an original objection to the

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complaint should be allowed here, but denied to the answer." The answer to this is supplied by the cases we have cited, and that is this: An objection may be made to a complaint on appeal because the statute expressly so provides. But for this statute, as the cases referred to very clearly show, an objection to a complaint could not be made in this court for the first time.

The finding and judgment of the court were entered on the 5th day of January, 1884, and on the 21st day of March following a written motion for a new trial was filed. The motion was not filed during the term, nor was any agreement made extending the time for filing the motion, nor was any order made by the court, nor was the finding made on the last day of the term. It is clear, therefore, that there is no proper motion for a new trial. R. S. 1881, section 561.

The case does not come within the provisions of section 563, as it is not asserted that it was for a cause discovered after the term. We can not look into the evidence, for the reason that there is no motion which properly brings it before us for review.

Judgment affirmed.

Filed Oct. 9, 1885.

No. 11,992.

CUPP ET AL. v. CAMPBELL.

MARRIED WOMAN.—*Mortgage of Separate Land to Secure Husband's Debt.*—*Contract of Suretyship.*—Under section 5119, R. S. 1881, a mortgage executed by a wife upon her separate land to secure her husband's debt, is a contract of suretyship, and void.

SAME.—*Mortgage to Pay Prior Encumbrance.*—Where a part of the money secured by the mortgage is applied to the payment of a valid prior encumbrance on the wife's land, to that extent she is principal and the mortgage binding. *Aliter*, if the prior encumbrance is void, *e. g.*, where the land was acquired by the wife by devise and was mortgaged to secure her husband's debt while the act of 1879, making void an encumbrance of land so acquired, for such purpose, was in force.

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SAME.—Inchoate Interest.—Where a wife joins in a mortgage of her husband's real estate, it is not, as to her inchoate interest, a contract of suretyship within the meaning of section 5119, R. S. 1881.

SAME.—Foreclosure.—Burden of Issue.—Where it is sought to foreclose a mortgage or enforce a contract against the separate property of a married woman, the plaintiff must aver and prove that the mortgage or other contract was one which she had the power to make. As to the mortgage, it is *prima facie* a sufficient answer for the wife to aver her coverture, and that the real estate is her separate property, and that the debt is her husband's.

SAME.—Estoppel.—A married woman may be bound by an estoppel *in pais*, but in the absence of fraud, misrepresentation or concealment, she is not estopped by the mere form of a contract which she had no power to make.

SAME.—Duty of Mortgagee to Inquire as to Consideration.—One contracting an encumbrance on the property of a married woman is bound to inquire concerning the consideration, whether it is for her benefit or for the benefit of another, and unless misled by her conduct or misrepresentations he will be held to have acquired a knowledge of the facts which prudent inquiry would have disclosed.

SAME.—Protection of Inchoate Interest.—*Semble*, that the protection of her inchoate interest in her husband's land is such a benefit as will uphold a mortgage on her separate estate to raise money for that purpose; but it must appear that she contracted with that object in view, or that the benefit actually resulted.

PRACTICE.—Sufficiency of Answer.—Supreme Court.—The sufficiency of an answer must be primarily questioned in the trial court, and the overruling of a demurrer to the reply is not available for this purpose.

PLEADING.—Bad Reply Sufficient for Bad Answer.—A bad reply is sufficient for a bad answer.

From the Hamilton Circuit Court.

W. Booth, for appellants.

T. J. Kane and *T. P. Davis*, for appellee.

MITCHELL, C. J.—This action was brought to foreclose a mortgage, executed by Elizabeth and Jacob B. Cupp, to one Wainwright, and by him assigned to Eliza M. Campbell.

The facts upon which the questions for decision arise are fairly set out in a special finding of the court. Briefly stated, they are as follows: Jacob B. and Elizabeth Cupp were, at the date of the execution of the mortgage in suit, husband

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and wife. The husband owned sixty acres of land in his own right, the wife, at the same time, being the owner of fifty-three acres, the title to which she acquired by devise from her father. On March 3d, 1880, Cupp and wife joined in a mortgage of her land to secure a debt owing by him which, at the date the mortgage in suit was executed, amounted, with interest, to \$555.46. The husband's land was, at the same time, subject to two mortgages, amounting to over \$1,800. Upon one of these the land had been sold but was still subject to redemption. For the purpose of paying off the husband's debts and discharging the encumbrances on the lands of both, a loan of \$2,600 was negotiated with Wainwright, which was secured by the joint notes of Cupp and wife and their joint mortgage on their respective tracts of land. The money borrowed was applied, so far as required for that purpose, to the discharge of the husband's debts, which were secured as stated; the residue was used by the husband, and the respective mortgages were cancelled.

It was found by the court, "that the defendant Elizabeth executed the mortgage and notes sued on herein as surety for her husband Jacob, and the debt evidenced thereby was and is the debt of her said husband; that at the time of the execution of said mortgage she and her husband read it over, but by reason of inexperience in business she did not fully comprehend the legal effect of the following clause in said mortgage, to wit: 'This mortgage is not made for the purpose of securing or paying debts contracted by my husband Jacob Cupp;' that it was no fault of the mortgagee that they did not understand it, but the latter was not deceived or misled thereby, as he knew that the debts to be paid were the husband's, and that the money was to be used in discharge of said encumbrances on said real estate of said defendants." The court also found that Mrs. Campbell purchased the notes and mortgage sued on in good faith, without any knowledge that they were given to secure the husband's debt, and that

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she relied on the statement contained in the mortgage which was duly recorded.

Upon the facts found, the court stated as conclusions of law, that as to the separate property of the wife, the mortgage was void, and that as to her the notes were void also. As to the land belonging to the husband, it was stated as a conclusion of law, that the plaintiff was entitled to a decree of foreclosure against both.

Plaintiff and Mrs. Cupp excepted to the conclusions of law, and both assign for error, on this appeal, that the court erred in its conclusions of law.

On behalf of Mrs. Cupp, who prosecutes the appeal, it is contended that the facts found make the notes and mortgage, as to her, a contract of suretyship, and that as such it was void under section 5119, R. S. 1881, as well in respect of her inchoate interest in her husband's land as in respect of her separate estate. Concerning this contention, it may be said that while it has been held that a wife who joins her husband in a mortgage upon his real estate occupies, as to her inchoate interest therein, a relation so far analogous to that of a surety as that she has a right to an order directing that the two-thirds of the lands mortgaged be first sold to satisfy the debt, as in *Leary v. Shaffer*, 79 Ind. 567, *Grave v. Bunch*, 83 Ind. 4, *Main v. Ginhert*, 92 Ind. 180, it has nevertheless been distinctly ruled, as we now again hold, that the contract in such case is not one of suretyship within the meaning of the statute. *Leary v. Shaffer*, *supra*; *Grave v. Bunch*, *supra*; *Dodge v. Kinzy*, 101 Ind. 102.

In behalf of the appellee, it is argued that upon the facts found it results as a conclusion of law, that the wife occupied the relation of principal to the extent that the money borrowed was obtained for the purpose and applied to the removal of the prior mortgage on her separate estate. The consideration of the prior mortgage was conceded to be the husband's debt, and it was executed while the statute of 1879 was in force. This statute enacted that "A married woman

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shall not mortgage or in any manner encumber her separate property acquired by descent, devise or gift, as a security for the debt or liability of her husband or any other person." Acts 1879, p. 160, sec. 10.

The court having found that Mrs. Cupp acquired her land by devise, the prior mortgage was directly within the prohibition of the statute, and was therefore void.

Counsel argue that so much of the finding of the court as states that the title of the wife was acquired by descent is outside of any issue made in the pleadings, and that, under the rule in *Boardman v. Griffin*, 52 Ind. 101, and *Town of Cicero v. Clifford*, 53 Ind. 191, it can not be considered.

This argument rests upon the assumption that it was necessary for the wife in her answer to aver a state of facts from which her want of power to execute the mortgage, so far as it affects her lands, would affirmatively appear. This assumption is erroneous. We held in *Vogel v. Leichner*, 102 Ind. 55, upon consideration of the question, that where it was sought to enforce a contract against the property of a married woman, the plaintiff must aver and prove that the contract was one which she had the power to make.

As was said in the case of *Bowman v. Kaufman*, 30 La. An. 1021, "Nothing is better settled than that the debt must be shown affirmatively to have enured to her benefit, when a party is seeking to enforce it against a wife, * * and the fact that she is separated in property from him does not change the nature of the proof required, nor shift the burthen of proof." *Brown v. Will*, *ante*, p. 71.

The plaintiff having declared upon the notes and mortgage, it was *prima facie* a sufficient answer for the wife to aver her coverture, as to the notes, and, as to the mortgage on the fifty-three acres, to add the fact that it was her separate property, and that the debt was her husband's. This cast upon the plaintiff the burden of avoiding her presumptive disability to bind herself by the notes, and her separate estate by the mortgage, by replying a state of facts from which it would

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be made to appear that they were executed upon a consideration which was intended either for her benefit or for the benefit of her estate. This the plaintiff assumed to do, by replying the previous encumbrance on her land, and by averring that it was a "valid lien," and alleging further that \$555.46 of the money borrowed and secured by the mortgage in suit was applied to the discharge of the prior encumbrance. The averment in the reply that the prior encumbrance was a valid lien, although a conclusion of law, necessarily embraced a statement of all facts essential to make it a valid lien. One fact necessary to make it a valid lien, the reply having conceded that the debt was the husband's, was that the title to the land should have been acquired in some other way than by "descent, devise or gift." Although the reply was inherently bad, inasmuch as it was filed by the appellee, and held good by the court, it will be treated here, as against the appellee, as though all the facts and conclusions therein stated were well pleaded. It can not, therefore, be said that the finding of the court, that the land was acquired by devise, was not within the issue.

The mortgage which was discharged having been given to secure the debt of the husband, and the land having been acquired by devise, it results that the mortgage thus given was void within the terms of the statute, and the question which remains is, can the wife be held on the notes, and the mortgage in suit be enforced against her separate property, to the extent that the money secured thereby was used in discharging the invalid prior mortgage?

We think this question must be answered in the negative. It was determined in *Vogel v. Leichner*, *supra*, that the note of a married woman, secured by a mortgage on her separate estate, given to secure a loan of money with which to discharge a prior valid encumbrance, even though such prior encumbrance was for the debt of her husband, did not constitute a contract of suretyship within section 5119, R. S. 1881. This section prohibits a married woman from en-

tering into a contract of suretyship, in any manner whatever, and declares all such contracts void as to her. That a mortgage executed by a wife upon her separate property, to secure the debt of her husband, is a contract of suretyship, and that such contracts are invalid, is now the settled law of this State. *Trentman v. Eldridge*, 98 Ind. 525; *Vogel v. Leichner*, *supra*; *Dodge v. Kinzy*, *supra*, and cases cited.

Where her estate is encumbered in such manner as that she is exposed to the hazard of losing it, even though such encumbrance is for the debt of another, it is manifestly beneficial that she should have the power to relieve it from the peril of such encumbrance, and when she and her husband contract a loan for that purpose, it can not be said that the consideration for such loan does not enure to her benefit. Where, however, an encumbrance is made on the wife's separate estate, to pay the husband's debt, or to remove an encumbrance which by the very terms of the statute she had no power to make, and which exposes her land to no peril whatever, we can discover no ground upon which it can be said that the consideration for an encumbrance so made enured to the benefit of the wife. One seeking to enforce a mortgage against the separate estate of a married woman must show by proof *aliunde* that the debt secured by the mortgage was either the debt of the wife, or that it enured to the benefit of her separate estate. *Bowman v. Kaufman*, *supra*. And if nothing further can be shown than that it was to pay the husband's debt, to secure which a mortgage had previously been made, which was within an absolute statutory prohibition, we think there is a failure of proof. Unless there is at least a *bona fide* question as to the validity of the encumbrance, resting on some apparent foundation, the contract is one of suretyship within the terms of the statute. *Warey v. Forst*, 102 Ind. 205.

It is argued that because the wife joined in the execution of the notes and mortgage, and so far contracted as principal in making the loan, she thereby recognized the validity

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of the prior mortgage, and that she is now estopped to assert its invalidity. The fact must be held in view, that all contracts of a married woman, the consideration of which moves to another, and which does not go to benefit her or her estate, are contracts of suretyship, and against all such contracts the statute interposes its prohibition by depriving her of the power to make them. She can not, therefore, be estopped into a contract which she had no power to make, by the form in which it is expressed. *Behler v. Weyburn*, 59 Ind. 143.

While it is true that a married woman is now subject to an estoppel *in pais*, like any other person, she is not to be estopped in any manner different from any other person. Some element of fraud, misrepresentation or concealment must enter into her conduct, so that the estoppel shall be predicated upon tort, and not upon contract. A married woman has no more right to injure or mislead others by her conduct or representations than if she were *sui juris*, and where it is made to appear that by fraud, misrepresentation or concealment, she has led one into contracting with her as principal, she will not be permitted to gainsay such representations as may have induced another to act who in good faith relied on them. *Oglesby Coal Co. v. Pasco*, 79 Ill. 164; *Powell's Appeal*, 98 Pa. St. 403; *Bigelow Estoppel*, 513; *Cooley Torts*, 117.

One contracting an encumbrance on the estate of a married woman can not, however, deal with her at arm's-length, knowing that she is married, and that by law she is prohibited from contracting for the benefit of another; and, knowing that she is about to encumber her separate estate in his favor, he is bound to inquire concerning the consideration, and ascertain, if he may, by reasonable inquiry from her, whether it is for her benefit or for the benefit of another, and unless misled by the conduct or representations of the wife, he will be held to have acquired a knowledge of the facts which prudent inquiry would have disclosed.

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The statute removing the disabilities of married women, to the extent that it does, was enacted to enable them to protect themselves and their property, and the prohibition against their making contracts of suretyship was designed to prevent them absolutely from making any contract, of which it was the intent that another should reap the benefit. The policy of the statute seems to be that to the extent that a married woman makes a contract, the purpose of which is to enable her more completely to use or enjoy her separate estate, such contract will be upheld; whenever it passes beyond this limit, it is prohibited. Considering the importunities to which they are liable, the statute should be construed so as to answer the purpose for which it was enacted.

It is suggested in the argument that the discharge of the encumbrances on her contingent interest in her husband's land was a sufficient consideration to make her a principal so far as the contract related to her separate estate, as was held in *Perkins v. Elliott*, 8 C. E. Green, 526. It might well be that the protection of her inchoate interest in her husband's land would be such a benefit as would make it within the power of the wife to mortgage her separate estate to raise money for that purpose. But to uphold an encumbrance of the wife's separate estate on that ground, it is apprehended that it must either appear that the wife contracted it with that end distinctly in view, or that it resulted in relieving her inchoate interest to such an extent that it could be said that she actually received the benefit of the consideration. In the case before us, it is neither averred in the pleading nor found by the court that the wife executed the mortgage with any such purpose in view, nor did it result in any actual benefit to her interest in her husband's land.

After the mortgage was made on her land, her interest in her husband's was by the same instrument encumbered as much as it was before. As we said in *Vogel v. Leichner*, *supra*, where a wife contracts for a benefit to herself or her estate, and is principal in fact as well as in form, she will be

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permitted to exercise her judgment and will be held to her contract as any other person, even though disappointed in the result, but it must appear that she did contract for and upon a consideration moving to herself or going to the benefit of her estate, and not for the benefit of another or upon a consideration to be received or already had by another. That she encumbered her land for her husband's debt, which was no encumbrance on her land, or to pay debts of her husband which encumbered his land, but which left it as much encumbered after the mortgage as before, can not be said to be a contract, the consideration of which moved to the benefit of the wife or to the benefit of her estate, either present or contingent.

Error is assigned by the parties respectively upon the ruling of the court in overruling the defendants' demurrer to the plaintiff's reply to the separate answer of Mrs. Cupp.

The appellee contends that as the answer was pleaded in bar of the whole complaint, as well to that part of it which proceeded against the sixty acres belonging to the husband as that which proceeded against the land of the wife, it was bad, and that the demurrer to the reply should have been carried back and sustained to the answer; that the answer was, for the reasons stated, insufficient, may be conceded, but without demurring to it the plaintiff replied, and upon demurrer his reply was held good. The case was tried, and no question was raised in any manner testing the sufficiency of the answer. Where a reply is filed to an insufficient answer, without first demurring, and a demurrer to the reply is overruled, and there is no other motion or ruling calling in question the sufficiency of the answer, as the party so replying has no exception in the record to any ruling on the answer, he can make no question here. *Scheible v. Slagle*, 89 Ind. 323; *Standley v. Northwestern M. L. Ins. Co.*, 95 Ind. 254. For the reason that the reply stated a conclusion instead of facts, in regard to the validity of the prior mortgage on the wife's land, it was not good, but, as the answer to

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which it was pleaded was bad, there was no error in overruling the demurrer to it.

It should be stated that no question was made either in the pleading or briefs of counsel upon any supposed estoppel in favor of the assignee, growing out of the stipulation contained in the mortgage, or the reliance placed thereon at the time she purchased and took the assignment of the note and mortgage, and we are, therefore, not called upon to determine the effect of the finding of the court in that regard.

As we find no error in the record the judgment is affirmed, with costs.

Filed Oct. 8, 1885.

No. 12,183.

CROXTON v. RENNER.

DECEDENTS' ESTATES.—*Jurisdiction to Grant Letters of Administration Statutory.*—The jurisdiction of a court to grant letters of administration on a decedent's estate is derived from the statute, and can only be exercised in the cases provided for thereby.

SAME.—*Discretion of Court.*—*Power to Revoke Letters Wrongfully Issued.*—Whenever a court has issued letters of administration which are not authorized by the express provisions of the statute, such court may, of its own motion, upon the application of any person interested, or upon the suggestion of an *amicus curiæ*, revoke or set aside the letters so issued, such issue being *coram non judice* and void.

SAME.—*Administrator de bonis Non.*—*Statute Construed.*—*Final Settlement.*—Sections 2240 and 2254, R. S. 1881, only authorize the courts to issue letters of administration *de bonis non* where a vacancy occurs in the administration of an estate before the final settlement thereof; and so long as the final settlement of an estate remains in full force, letters of administration *de bonis non* can not be issued.

From the Steuben Circuit Court.

J. A. Woodhull and W. M. Brown, for appellant.

C. A. O. McClellan and D. A. Garwood, for appellee.

Howk, J.—In this case the appellant, Croxtan, the defend-

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ant below, has assigned upon the record of this cause as errors the following decisions of the circuit court :

1. In overruling his demurrer to appellee's petition herein ;
2. In sustaining appellee's demurrer to the second paragraph of his answer ; and,
3. In rendering judgment on the pleadings, revoking the appellant's letters of administration.

We will consider and decide the questions arising under these alleged errors in the order of their assignment.

1. In his petition the appellee, Renner, an infant, by his next friend, represented to the court that he was a minor and resided in Steuben county, Indiana ; that on the 28th day of November, 1884, the appellee found upon the ground in one of the streets of the village of Hamilton, in such county, the sum of \$723.50 in money, where it had been lost by some one then and since unknown to appellee, and, not knowing to whom such money belonged, he, on November 29th, 1884, deposited a part thereof, to wit, \$650, in the Angola bank ; that, after leaving such money in such bank for a period of thirty days, and not being able to ascertain to whom it belonged, the appellee demanded the money from such bank, and the bank refused payment thereof, alleging that William G. Croxtan, who pretended to be the administrator *de bonis non* of the estate of Richard Colton, deceased, claimed to be the owner of such money as such administrator ; that the appellant, Croxtan, as such administrator, notified such bank not to pay such money to the appellee ; that on the 7th day of January, 1885, appellant, Croxtan, as such administrator, instituted an action in the court below against the Angola bank to recover the identical money ; so deposited by appellee, as the money of such decedent, which suit was still pending in such court.

And the appellee further showed that said Richard Colton died in Steuben county, on or about the — day of ———, 1864, intestate, leaving assets in such county of the value of \$13,000, or more ; that one Harlow J. Carpenter, a resident

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of such county, and a competent person, on the 11th day of June, 1864, was duly appointed administrator of the estate of said Richard Colton, deceased, duly qualified as such, and that on the 7th day of September, 1864, such appointment was duly confirmed by the common pleas court of Steuben county; that said Carpenter, as such administrator, took possession of the assets of said estate, reduced them to money, and fully settled such estate, and, on the 8th day of May, 1868, made out and presented to the common pleas court of Steuben county, in open court, his final settlement report; which report was accepted and approved by such court, said estate declared finally settled, and said administrator fully discharged from his trust, which final settlement remained unrevoked and in full force; and that the said estate so settled was the same estate of which the appellant Croxtan claimed to be administrator *de bonis non*.

And appellee further showed that the appellant, Croxtan, for the sole purpose of getting possession of such money so found by appellee, procured himself to be appointed administrator *de bonis non* of such estate of Richard Colton, deceased, at the last term of the court below; which appointment and the confirmation thereof were made upon the same day and at the same time, without the knowledge of appellee, who had no opportunity to object to such appointment; and the appellee averred that such appointment and confirmation were made without authority of law and were void, and that further administration upon said estate should not be permitted, and he asked that such letters of administration *de bonis non*, issued as aforesaid to the appellant, Croxtan, should be revoked and set aside, and that he be removed.

The appellant, Croxtan, demurred to appellee's petition upon the ground that it did not state facts sufficient to constitute a cause of action.

Appellant's counsel say in their brief of this cause, that "the principal question involved in this case arises on the demurrer

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to the petition;" and, we may properly add, this is the only question upon which they rely in argument for the reversal of the judgment below. It is shown by the record that after the appellant had withdrawn his answer, in general denial, the cause was submitted to the court for trial upon the appellee's verified petition or complaint; and that the court found that the appointment of appellant, Croxtan, administrator *de bonis non* of the estate of Richard Colton, deceased, ought to be vacated and set aside, and judgment was rendered accordingly. It is claimed in argument that the court below had jurisdiction to issue letters of administration; that, in the exercise of such jurisdiction, the court issued the letters of administration *de bonis non* to the appellant upon the estate of Richard Colton, deceased; that the only remedy of any person aggrieved by such action of the court was an appeal to this court within the time and in the manner prescribed by the statute; and that however wrongful, illegal, improvident or erroneous may have been the action of the court below in the issue of such letters, such court can not, upon the application of an aggrieved party, or upon the suggestions of an *amicus curiæ*, or upon its own motion, vacate, annul or set aside the letters so issued.

This question was considered by this court to some extent, at least, in *Jeffersonville R. R. Co. v. Swayne's Adm'r*, 26 Ind. 477. It was there held, *inter alia*, that the jurisdiction of the court to grant letters of administration is derived from the statute, and can only be exercised in the cases provided for thereby. If this point is well decided, as it surely is, it must follow, we think, that whenever the court has issued letters of administration, which are not authorized by, but directly contravene, the express provisions of the statute, such court may, of its own motion, or upon the application of any person interested, or upon the suggestion of an *amicus curiæ*, revoke, annul or set aside the letters so issued; for, in such case, the issue of the letters is *coram non judice* and void.

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The only statutory provisions of this State which authorize the issue of letters of administration *de bonis non* upon a decedent's estate will be found in sections 2240 and 2254, R. S. 1881, in force since September 19th, 1881. An examination of these sections of the statute clearly shows that they only authorize the courts to issue letters of administration *de bonis non* in a case where a vacancy occurs in the administration of an estate before the settlement of such estate is finally completed and established by the judgment of the proper court. This is the doctrine of the well considered case of *Pate v. Moore*, 79 Ind. 20, which is decisive, we think, of the case in hand adversely to the appellant. It was there said: "It necessarily follows that so long as the final settlement of an estate remains unrevoked, and in full force, letters of administration *de bonis non* can not be issued on such estate, nor can any further administration upon such estate be permitted by any executor or administrator, however appointed." See, also, *Vestal v. Allen*, 94 Ind. 268.

We find no error in the record of this cause.

The judgment is affirmed, with costs.

Filed Oct. 10, 1885.

No. 11,924.

THE WESTERN UNION TELEGRAPH COMPANY v. SCIRCLE.

TELEGRAPH COMPANY.—Action for Penalty Survives.—A cause of action against a telegraph company to recover the statutory penalty for a breach of duty does not die with the original party in interest, but survives to his representatives.

SAME.—Statutory Action.—Pleading and Proof.—Where an action is founded on a statute, the plaintiff need only allege and prove such facts as bring the case within the statute.

SAME.—Complaint.—Telegraphing for Hire.—Where the complaint alleges that the defendant was engaged in telegraphing for the public, it is sufficient under the statute without alleging that it was for hire.

SAME.—Rule Limiting Time for Filing Claims is an Affirmative Defence.—A

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defence, founded upon a rule of the corporation limiting the time within which claims shall be presented, is an affirmative one and not available under the general denial.

SAME.—*Delay in Transmitting Message.*—*Burden of Proof.*—Where the sender of the message proves that there was an unreasonable delay, the burden of explaining the delay is upon the company.

SAME.—*Diligence.*—A delay of several hours in transmitting a message that only requires from five to fifteen minutes for its transmission, shows a want of diligence.

SAME.—*Duty of Company to Provide Proper Assistance.*—Where the business of an office is such that one operator can not receive messages with reasonable promptness, it is the duty of the company to supply the required assistance.

From the Clinton Circuit Court.

J. R. Coffroth, T. A. Stuart, J. A. Stein, B. K. Higginbotham and M. Bristow, for appellant.

A. E. Paige and S. O. Bayless, for appellee.

ELLIOTT, J.—George A. Scircle commenced two actions against the appellant to recover the statutory penalty affixed to a breach of duty.

On appellant's motion the actions were consolidated, and in the consolidated action issue was joined. After the issue was joined the plaintiff died, and his widow, Martha J. Scircle, was substituted as plaintiff, and she recovered judgment for the statutory penalty.

One of the contested questions is the right of the appellee to maintain this action. The appellant insists that the cause of action died with the original plaintiff. We can not assent to this doctrine, for, in our judgment, the statute prevents the abatement of the action. It is provided that "A cause of action arising out of an injury to the person," except in the cases designated, "dies with the person of either party," but it is also provided that "All other causes of action survive, and may be brought by or against the representatives of the deceased party, except actions for promises to marry." If the cause of action in this case is not for an injury to the person, it must survive, for the statute, in broad and explicit

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terms, declares that all causes of action other than those arising out of an injury to the person shall survive. The cause of action here declared on is founded on a statute, and is not for an injury to the person. It is an action to enforce a right created by statute, and does not belong to the class of actions where redress is sought for a personal injury. Under the common law practice, the remedy in such a case as this would be an action of debt. Bacon Abridg., title Debt; 1 Chitty Plead. 125; *Corporation, etc., v. Eaton*, 4 Cranch C. C. 352; *United States v. Colt*, Peters C. C. 145; *Bogart v. City of New Albany*, 1 Ind. 38. It is perfectly clear, therefore, that the common law did not regard an action for the recovery of a penalty as an action to recover for an injury to the person, and there is certainly nothing in our statute changing the rule of the common law. Where the statute employs common law terms having a known meaning, it is presumed, unless the contrary affirmatively appears, that the terms were used in their common law meaning. *State v. Berdette*, 73 Ind. 185; S. C., 38 Am. R. 117; *Bloom v. Franklin Life Ins. Co.*, 97 Ind. 478, see p. 481 (49 Am. R. 469). This rule applies here, and we must presume that the words "A cause of action arising out of an injury to the person" are used to convey the same meaning as at common law. It is, indeed, impossible to conceive that any other meaning than that ascribed to them by the common law could be assigned to them. When it is granted, as it must be, that there is a cause of action, and that it is not for an injury to the person, it follows with absolute logical certainty that the cause of action survives by force of the statute.

We agree with counsel, that a statute creating a penalty, and conferring upon an individual a right to sue for it, may be repealed at any time before final judgment. *Norris v. Crocker*, 13 How. 429. This argument, however, is not relevant to the point in dispute, for the question is not whether the Legislature may sweep away the penalty, but the question is whether the representative of the person entitled to

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it may after his death continue an action brought by him during his lifetime.

We do not doubt the soundness of the general rule that a statute giving a penalty does not execute itself, and can not summarily transfer a penalty to the person for whose benefit it is created, without a judicial investigation. But that rule does not govern here. The question is, not whether the statute may summarily put the penalty directly into the hands of the person for whose benefit it was created, but the question is, does the statute create a cause of action which may be enforced by due process of law? It is evident from what we have said that *Willis v. Legris*, 45 Ill. 289, has no application here.

It is the law, as we have often held, that the sender of the message is the party who must sue. *Western Union Tel. Co. v. Pendleton*, 95 Ind. 12 (48 Am. R. 692); *Western Union Tel. Co. v. Reed*, 96 Ind. 195; *Seward v. Beach*, 29 Barb. 239; *Thompson v. Howe*, 46 Barb. 287. But he is the party who must sue because the cause of action is in him, and if there is a cause of action it is one that survives, for the reason that it is on a statute, and is not for an injury to the person. If the sender had a right of action, his death did not destroy it, although he was the proper party plaintiff while living, as the right of action is one that survives. Once it is conceded that he did have a cause of action, and that it was not for an injury to the person, there is no escape from the conclusion that it did survive. The argument of the appellant's counsel, that the cause of action was in the sender, proves too much for their purpose, for it proves that there was a cause of action on a statute, and consequently that it survives to the representatives of the person to whom the statute gave the right of action.

The complaint is assailed upon the ground that it does not state facts sufficient to constitute a cause of action. One of the reasons assigned in support of this general assault is, that the complaint does not allege that the appellant has a line of

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wires wholly or partly within this State. The complaint alleges that "the defendant is the owner and operator of an electric telegraph, with a line of wires running through Clinton county, Indiana, including the stations of Scircleville and Frankfort, in said county." This we deem sufficient. *Western Union Tel. Co. v. Walker*, 102 Ind. 599.

The second reason assigned is that the complaint does not aver that the appellant was engaged in telegraphing for the public for hire. The complaint does aver that the appellant was engaged in telegraphing for the public, and this is the averment which the statute requires. The statute does not require that it shall be averred that the company was telegraphing for the public for hire. *Western Union Tel. Co. v. Walker*, *supra*.

The remaining questions arise on the ruling denying a new trial, and we will dispose of them in the order in which they are presented in the argument of counsel.

It is contended that the finding of the trial court is wrong upon the evidence, for the reason that it appears that the claim was not presented within the time limited by the contract, and we are referred to the cases of *Western Union Tel. Co. v. Jones*, 95 Ind. 228 (48 Am. R. 713), *Western Union Tel. Co. v. Pendleton*, *supra*, *Western Union Tel. Co. v. McKinney*, 5 Texas L. Review, 173, *Western Union Tel. Co. v. Pells*, 2 Texas L. Review, 276, *Young v. Western U. Tel. Co.*, 65 N. Y. 163, and *Heimann v. Western U. Tel. Co.*, 57 Wis. 562.

We do not question the soundness of the general doctrine that a rule of a telegraph corporation making a reasonable regulation as to the time within which claims shall be presented is valid, but we do not believe that the rule can avail in an action to recover a statutory penalty, unless the defence is specially pleaded. A defence founded upon a corporate rule limiting the time within which claims shall be presented is an affirmative defence, and not available under the general denial. Where an action is founded on a statute, all the facts

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that a plaintiff need allege or prove are such as bring the case within the statute, and where a defendant relies upon a defence which confesses and avoids the case made by the complaint, he must plead it specially. It would be a plain violation of the letter and spirit of our code to permit such a defence as that now urged to be made available under the general denial, and it would also be in open hostility to a long line of decisions. As there was no affirmative answer in this case, the defence that the appellant here urges is unavailing.

It is insisted that the evidence "shows that the company was not negligent." The law of this branch of the case is this: Where the sender of the message proves that there was an unreasonable delay, the burden of explaining the delay devolves upon the telegraph company. *Julian v. Western Union Tel. Co.*, 98 Ind. 327; *Telegraph Co. v. Griswold*, 37 Ohio St. 301 (41 Am. R. 500); *Bartlett v. Western Union Tel. Co.*, 62 Maine, 209 (16 Am. R. 437); *Rittenhouse v. Independent Line*, 44 N. Y. 263; S. C., 4 Am. R. 673; *Baldwin v. U. S. Tel. Co.*, 45 N. Y. 744; S. C., 6 Am. R. 165; *Turner v. Hawkeye Tel. Co.*, 41 Iowa, 458; S. C., 20 Am. R. 605; *So Relle v. Western Union Tel. Co.*, 55 Texas, 308 (40 Am. R. 805). This rule is in harmony with that which requires a common carrier of passengers to show that an injury to a passenger was not caused by its negligence. *Terre Haute, etc., R. R. Co. v. Buck*, 96 Ind. 346, authorities cited, p. 358 (48 Am. R. 168); *Bedford, etc., R. R. Co. v. Rainbolt*, 99 Ind. 551. The rule is, in itself, a reasonable one.

The sender of a message has no means of knowing the cause of the delay, for he is not acquainted with the business and operations of the telegraph company, and he can not give any explanation; on the other hand, the company has full means of knowledge and ample opportunity for making an explanation where any exists. To require the sender of the message to explain the delay, or the failure to transmit, would put him at the mercy of the telegraph company with-

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out means or opportunity of establishing the breach of duty upon which his action is founded.

The message described in the first paragraph of the complaint was delivered to the operator at Scircleville to be transmitted to Frankfort, and was delivered to the operator at the former place at forty minutes after eight o'clock on the morning of November 10th, 1883, but was not received by the person to whom it was addressed until forty-five minutes after eleven o'clock in the forenoon. The message described in the second paragraph of the complaint was delivered to the operator at Scircleville at fifty minutes after six o'clock on the morning of the twelfth of November, but was not received by the person to whom it was addressed until about fifteen minutes before one o'clock of that day. Frankfort is not far from Scircleville, and the agent of the appellant at the former place testified that "It takes from five to fifteen minutes continuously to get a message from Scircleville to Frankfort." Dr. Canfield, the person to whom the message was addressed, lived directly across the street from the appellant's office at Frankfort. This evidence shows a delay that requires explanation. It is not such diligence as the statute requires, to consume several hours in transmitting messages that only required from five to fifteen minutes for their transmission.

The testimony of the appellant's agent at Frankfort is relied upon as explaining the delay in transmitting the messages. That testimony is as follows: "I was manager and operator of the telegraph company at Frankfort when these two messages were sent, November 10th and 12th. I took the dispatches from the wires as soon as I could. I was prevented from taking them sooner by a press of business at the time. I was working for three hours, and would be busy at a certain time. There were eight or nine wires in the office at the time. I was busy on this wire at the time the dispatches were sent. Just as soon as I finished the work I was at when Scircleville called I took the dispatches, and they were

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delivered promptly, within a few minutes after. I might have received ten, I might have received thirty dispatches the mornings these dispatches were received." We do not think this testimony will justify us in disregarding the finding of the trial court. It does not show that the agent did not take messages from the wire that had of right no precedence of the message addressed to Dr. Canfield. For anything that appears, the messages received by the operator at Frankfort were not delivered for transmission until long after those addressed to Dr. Canfield were delivered to the operator at Scircleville. Nor is there anything to show that these messages were not entitled to be received and delivered before receiving and delivering all of the ten or the thirty messages mentioned in the testimony. The operator says he "was working for three hours," and, granting this, still there was ample time to have received and delivered one, at least, of the messages sent from Scircleville, for the time elapsing from its delivery to the operator at that point until its delivery to the person to whom it was addressed was five hours and fifty-five minutes. But there is a broader ground upon which the findings of the trial court may be sustained, and that is this: If the business of the Frankfort office was such that one operator could not receive messages with reasonable diligence and promptness, it was the duty of the company to supply the requisite assistance. A telegraph company can not escape liability for a breach of duty by asserting its own failure to provide adequate means for transacting the business which it invites from, and undertakes for, the public. It has no right to accept business which it has not made reasonable provision for transacting as the law requires. In view of the evidence before us, we can not declare that the Frankfort office was an unimportant station, requiring only one operator to conduct its business. It is a well established rule that this court will respect the finding of a trial court upon the evidence unless it is clearly erroneous, and we can not say that the trial court erred in inferring that Frankfort, the city in which that court

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was sitting, was an important telegraph station, requiring the services of more than one operator to ensure the diligent and prompt delivery of messages.

Judgment affirmed.

Filed Oct. 10, 1885.

No. 12,212.

THE STATE v. WILLIAMS.

CRIMINAL LAW.—Obtaining Goods by False Pretences.—Indictment.—In an indictment for obtaining goods by false pretences, it is sufficient to charge the ownership of the goods so obtained to be in a partnership by its firm name, under section 1753, R. S. 1881, and that the false pretences were made to the partnership by its firm name.

SAME.—Belief in False Representations.—Where the indictment in such case avers that said firm "relying on said false representations," etc., it sufficiently appears that the representations were believed to be true.

SAME.—Goods must be Obtained by False Pretences.—An indictment averring that, for the purpose of obtaining "credit," certain false representations were made, and that by means of the representations thus made, the defendant did then and there obtain from, etc., "on credit," certain goods, etc., does not sufficiently show that the goods were delivered in pursuance of the alleged false representations, as the connection between the false pretences and the obtaining of the goods on credit is not shown.

From the Wells Circuit Court.

E. C. Vaughn, Prosecuting Attorney, for the State.

MITCHELL, C. J.—The State, by its appeal in this case, presents the question of the sufficiency of an indictment for obtaining goods by false pretences.

After the formal part, the indictment charges, in substance, that Hiram B. Williams, on a date mentioned, "did then and there feloniously, designedly, and with intent to defraud Francis H. Leggett & Co., and for the purpose of obtaining credit of and from the firm of Francis H. Leggett & Co.,

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falsely pretend to the said Francis H. Leggett & Co., that the firm known as H. B. Williams & Co., dealing in and selling groceries and general merchandise in the city of Bluffton, Indiana, was composed of H. B. Williams and Reuben Stout, * * * and that the said Reuben Stout was the company, meaning thereby that the said Reuben Stout was a partner of the said H. B. Williams and a member of the firm of H. B. Williams & Co., and the said firm of Francis H. Leggett & Co. relying on said false representations, and by means of said false representations and pretences, the said Hiram B. Williams did then and there feloniously obtain from the said Francis H. Leggett & Co., on credit." Here follows a description of various articles of personal property and their value, after which the indictment proceeds: "All of the personal goods and chattels of Francis H. Leggett & Co., with the intent then and thereby to cheat and defraud the said firm of Francis H. Leggett & Co., whereas in truth and in fact the said Reuben Stout was not the 'company' nor a member of said firm of H. B. Williams & Co.," etc.

A motion to quash was sustained. As there is no brief on behalf of the appellee, we are without information as to the grounds upon which the indictment was deemed insufficient.

It is said by the prosecuting attorney in his brief, that the first objection which was made to the indictment in the court below was, that the names of the members of the firm whose property was obtained were not set out. It is claimed that this objection is untenable by reason of section 1753, R. S. 1881. This section provides that "When any offence is committed upon or in relation to any property belonging to partners or to several joint owners, or which, when the offence was committed was in possession of a bailee or tenant, the indictment or information for such offence shall be deemed sufficient, if it allege the ownership of such property to be in such partnership by its firm name," etc. Under this section, it would doubtless be sufficient to charge the ownership of the property, the possession of which was obtained by means of the

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alleged false pretences, to be in the partnership by its firm name; but the question still remains, was it sufficient to charge that the false pretences were made to the partnership by its firm name? We do not think the statute referred to affects the question. Without regard to the statute, however, it was proper to charge that the representations were made to the partnership by its firm name.

In the case of *Commonwealth v. Harley*, 7 Met. 462, the charge was that the defendants "did designedly and falsely pretend and represent to said George B. Blake & Co. that," etc. It was held that the indictment was sustained by proof that the representation was made to a clerk of the firm. *Stoughton v. State*, 2 Ohio St. 562; *Commonwealth v. Call*, 21 Pick. 515; 2 Whart. Crim. L., sections 1171, 1212.

The next objection said to have been made to the indictment is that it does not aver that the firm of Francis H. Leggett & Co. believed the representations to be true. The averment in the indictment is, that "relying on said false representations," etc. It was held in *Clifford v. State*, 56 Ind. 245, that this was a sufficient averment that the representation was believed to be true.

It is also said that objection was made to the indictment because it did not appear that the goods were delivered in pursuance of the alleged false representations. The averments in that regard are, that, for the purpose of obtaining "credit," certain false representations were made, and that by means of the representations thus made Williams did then and there obtain from Francis H. Leggett & Co., "on credit, certain goods," etc.

It does not appear from the averments in the indictment whether the goods were obtained as a result of negotiations for a purchase, loan or exchange; simply that they were obtained on credit. We think this is too uncertain. The connection between the false pretences and the obtaining of the goods on credit is not shown.

In *Commonwealth v. Strain*, 10 Met. 521, it was said that

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the "sale or exchange ought to be set forth in the indictment, and that the false pretences should be alleged to have been made with a view to effect such sale or exchange, and that by reason thereof the party was induced to buy or exchange, as the case may be." *State v. Philbrick*, 31 Maine, 401.

In the case last cited the indictment averred that by means of certain false pretences the accused did then and there knowingly and designedly obtain one horse of the value of fifty dollars from one Goff. It was held bad, because it contained no allegation that by reason of such false pretences Goff was induced to sell or exchange his horse. *Todd v. State*, 31 Ind. 514; *State v. Orvis*, 13 Ind. 569; *Johnson v. State*, 11 Ind. 481; *Jones v. State*, 50 Ind. 473; *Wagoner v. State*, 90 Ind. 504.

We think there was no error in the ruling of the court, and the judgment is affirmed.

Filed Oct. 9, 1885.

No. 12,079.

UPPINGHOUSE v. MUNDEL.

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MALICIOUS PROSECUTION.—*Probable Cause.*—*Proceeding at Law.*—To constitute a proceeding at law a malicious prosecution, it must not only be prosecuted maliciously, but without probable cause.

ATTACHMENT.—*Proceedings Wrongful and Oppressive.*—To make a party liable for causing a writ of attachment to be issued, it must be shown that the proceeding was wrongful and oppressive under the law under color of which it was prosecuted.

SAME.—*Transfer of Claim.*—*Injuria sine Damno.*—The transfer of a just debt to the jurisdiction of another State, where, by appropriate judicial proceedings, its collection was enforced with greater facility and more effectually than could have been done, if at all, in this State, is not an injury for which damages may be recovered.

SAME.—*Statute Construed.*—The statute declaring such a transfer to be a misdemeanor, R. S. 1881, section 2163, was enacted to promote the public welfare, and not to redress merely private grievances.

From the Floyd Circuit Court.

C. L. Jewett, for appellant.

J. H. Stotsenburg, for appellee.

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NIBLACK, J.—Complaint by Calvin C. Uppinghouse against Caroline Mundel for damages. A demurrer was sustained to the complaint, and there was final judgment against the plaintiff upon demurrer. This appeal is prosecuted upon the theory that the circuit court erred in holding the complaint to be insufficient upon demurrer.

The complaint charged that at the time of the commission of the grievances complained of, the plaintiff, the defendant and the corporation known as the Louisville, New Albany and Chicago Railway Company, were each and all within the jurisdiction of the State of Indiana; that the plaintiff was, also, at the time, a resident householder of Floyd county in this State, and in the employment of said railway company at monthly wages; that said railway company was then indebted to him, the plaintiff, in the sum of seventy-five dollars; that the plaintiff was not the owner of any real estate, and his entire personal estate did not exceed in value the sum of \$300; that the defendant, intending to injure the plaintiff, did, in January, 1883, wrongfully and unlawfully transfer to the firm of Hannon Brothers, of the city of Louisville, in the State of Kentucky, a claim for debt amounting to the sum of sixty dollars, which was due from the plaintiff to the defendant; that the defendant transferred said claim for debt to the said Hannon Brothers for the purpose of having such claim collected out of the wages due to the plaintiff from said railway company by proceedings in attachment and garnishment in the said State of Kentucky; that after the transfer of said claim as stated the said Hannon Brothers commenced a proceeding in attachment against the plaintiff before one McCann, a justice of the peace of Jefferson county, in said State of Kentucky, and in said proceeding attached the wages due to the plaintiff, as above set forth, and also summoned the said railway company to answer as garnishee as to the amount of wages due from it to the plaintiff; that in, and as part of, such proceedings, it was ordered and adjudged by said

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justice that the railway company should pay into his court the sum of \$75, so due from it to the plaintiff for wages, in satisfaction of the claim sued on and costs of suit; that thereafter the said railway company paid said sum of money so due for wages into the said justice's court, where it was all applied in payment of the claim transferred by the defendant to Hannon Brothers as herein above stated, and the costs of the proceedings in attachment and garnishment; that by reason of the premises, the plaintiff was deprived of all benefit of the exemption laws of the State of Indiana, enacted for the protection of householders and their families; that on account of the annoyance which such attachment and garnishment proceedings inflicted upon the railway company, it discharged the plaintiff from its employment, and he and his family were in consequence left in a destitute and suffering condition, and he was put to great expense in obtaining other employment, all to the plaintiff's damage in the sum of five hundred dollars.

Section 2163, R. S. 1881, is as follows: "Whoever, either directly or indirectly, assigns or transfers any claim for debt against a citizen of Indiana, for the purpose of having the same collected by proceedings in attachment, garnishment, or other process out of the wages, or personal earnings of the debtor, in courts outside of the State of Indiana, when the creditor, debtor, person, or corporation owing the money intended to be reached by the proceedings in attachment are each and all within the jurisdiction of the courts of the State of Indiana, shall, upon conviction thereof, be fined in any sum not more than fifty dollars nor less than twenty dollars for each offence."

The sufficiency of the complaint is sought to be maintained upon the ground that by the unlawful act of transferring the claim against him to Hannon Brothers, the appellant was deprived of his right to an exemption of a specified amount of property from execution, to which he was entitled under the

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laws of the State of Indiana, and was, in consequence, compelled to pay, out of his wages, a debt of \$60 which he could not have been successfully required to pay by any proceedings in the courts of this State. Therefore, as construed by counsel, the demand made by the complaint was only for consequential damages resulting from an act declared by law to be a misdemeanor, and for that reason had no analogy, either to an action for a malicious prosecution, or to a suit upon an attachment bond for wrongfully suing out a writ of attachment.

To constitute a proceeding at law a malicious prosecution, it must not only be prosecuted maliciously, but without probable cause. To make a party liable for causing a writ of attachment to be issued, it must be shown that the proceeding was wrongful and oppressive under the law under color of which it was prosecuted.

The fair and, indeed, necessary inference from the averments of the complaint was, that the debt transferred by the appellee to Hannon Brothers was a just debt, and one which might have been collected from the appellant by proper proceedings in this State out of any property he then had or might thereafter have acquired subject to execution. It was not otherwise charged, and was hence inferentially admitted, that the attachment and garnishment proceedings had before Justice McCann were authorized by and in accordance with the laws of the State of Kentucky. It has been held, and so far as we are advised it is still the rule in that State, that the mere failure to succeed in an attachment suit does not forfeit the bond given to indemnify the defendant, but that it must be affirmatively shown that the suit was instituted without just cause. *Pettit v. Mercer*, 8 B. Mon. 51. Consequently, as applied to proceedings in that State in which the plaintiff obtains a judgment in attachment, the presumption in favor of the justice of the debt and the legality of the proceedings must be as strong, if not stronger, than it should

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be as applicable to similar proceedings in this State where all the presumptions are ordinarily indulged in support of the propriety and regularity of judicial proceedings. *Harper v. Keys*, 43 Ind. 220.

It is not claimed that the mere transfer of the debt in this case by the appellee to Hannon Brothers, however unlawful or even criminal the intent may have been, conferred any right of action upon the appellant. The statute declaring such a transfer to be a misdemeanor was enacted to promote the public welfare, and not to redress merely private grievances. The *gravamen* of the appellant's demand for damages was consequently based only upon the alleged injurious consequences which followed, as well as resulted from, the transfer of the debt. These consequences were the transfer of the ownership of the debt to the jurisdiction of another State where, by appropriate judicial proceedings, its collection was enforced with greater facility, and more effectually than could have been done, if at all, in this State. But can a resort to a remedy which the law has provided for such and similar cases be regarded as *injury* in the full and legal meaning of that term? We know of no principle or precedent which would justify such an assumption.

Weeks on *Damnum Absque Injuria*, at page 12, says: "Where an act, authorized by law, gives rise to damages, it is therefore generally *damnum absque injuria*; and where an unauthorized act results in detriment or loss to another, if it is not a damage in contemplation of law, it is *injuria sine damno*. The injury must be such as the law regards as an injury, as it is not every loss that results to the plaintiff, through the act of the defendant, for which damages may be recovered."

Conceding, therefore, that, by the transaction complained of, the appellant was compelled to pay a debt which by reason of our exemption laws, could not then have been collected from him in this State, and that, under the circumstances and in consequence, much annoyance and inconvenience were

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inflicted upon him in his business, no injury, in contemplation of law, resulted to him from the transfer of the debt in question. Cooley Torts, 180, *et seq.*; 2 Sutherland Dam. 58.

The judgment is affirmed, with costs.

Filed Oct. 13, 1885.

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No. 11,783.

WILLIAMS ET AL. v. STEVENSON.

DRAINAGE.—Dismissal of Petition.—Practice.—To present any question as to a ruling upon a motion to dismiss the petition in a drainage proceeding, such motion must be made part of the record.

SAME.—Amendment of Petition after Filing Report.—Under section 4276, R. S. 1881, the circuit court had authority to allow an amendment of the petition after the filing of the report of the drainage commissioners.

SAME.—Practice.—Supreme Court.—To save any question for decision in the Supreme Court as to the proposed amendment, the objecting party should require its nature to be shown at the time leave to amend is asked.

SAME.—Waiver.—Where an amended petition is filed without objection, an assignment of error in the Supreme Court, that the trial court erred in permitting it to be filed, presents no question.

SAME.—Notice.—Affidavit.—Omission of Jurat.—Power of Court to Hear Evidence and Order Officer to Affix Jurat.—Where no jurat is attached to the affidavit as to the posting of notices in a drainage proceeding, the trial court may subsequently hear evidence that such affidavit was in fact sworn to at the proper time before the clerk, and order that officer to affix his jurat thereto as of that date.

SAME.—Weight of Evidence.—The Supreme Court will not reverse a judgment upon the weight of the evidence.

From the Spencer Circuit Court.

D. T. Laird, for appellants.

W. H. Thomas, for appellee.

ZOLLARS, J.—Upon the petition by appellee, a drain was located and established under R. S. 1881, section 2473, *et seq.* From the final judgment establishing it, appellants have appealed, and assigned errors upon which they ask a reversal of the judgment.

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The rule is well settled that the questions for decision here are such, and only such, as are presented by the assignment of errors, and that the record must so present the rulings below that this court may determine as to the correctness of them. *Stockwell v. State, ex rel.*, 101 Ind. 1. We must therefore confine our examination to the alleged errors assigned, and pass upon the rulings below so far, and only so far, as the record so presents them, that we may intelligently determine whether they are correct or erroneous.

The first error assigned is as follows: "That the court erred in overruling appellants' motion to dismiss appellee's petition for drainage and the report of the commissioners of drainage."

The argument in behalf of appellants, under this assignment, is that the commissioners of drainage should not have examined lands other than those described in the petition. If there is, or could be, any substance in this objection and argument, it would go to the report of the commissioners, and not to the petition. In no event could the action of the commissioners be a reason for dismissing the petition. The report of the commissioners may be objected to, and for a sufficient cause set aside, but that would not carry the petition. In this case, however, we can not disregard the contention of appellee, that the record presents nothing for decision under this first assignment of errors. The clerk below recites in the transcript that appellants severally moved to dismiss the petition, "for the reasons stated in each of said objections." If there was a written motion, or written objections, filed below, counsel do not inform us where it may be found in the record. After a thorough search we have failed to find such a motion in the record. Without the motion, we can not know upon what reasons it was based, and hence can not decide as to whether or not the court ruled correctly or incorrectly in overruling it.

The second and eighth assigned errors may be considered together. They are as follows: "*Second.* That the court erred

in overruling appellants' objection to the granting of leave to appellee to amend his petition for drainage." "*Eighth.* That the court erred in permitting appellee to file an amended petition."

The circuit court, without doubt, had authority under the statute then in force to grant leave, and to allow an amendment of the petition after the filing of the report of the drainage commissioners. The statute provided in express terms, that the petition might be objected to after the filing of such report, and that the court might allow an amendment of it. R. S. 1881, section 4276. What amendment was proposed is not shown by the record entry at the time, nor by anything else in the record; nor is it shown that appellants asked that the nature of the proposed amendment should be then stated or shown. From the record before us, we can not know what objections were urged to the petition, nor the nature of the amendment proposed. To save any question for review and decision here upon this branch of the case, appellants should have, in a proper manner, required the nature of the proposed amendment to be stated and shown at the time the leave to amend was asked and granted. This they did not do. Without a knowledge of the amendment proposed, we can not say that the court below erred in granting the leave to amend. We can not assume nor presume that in granting such leave the court below transcended its authority; we should rather presume in favor of the correctness of the court's ruling. It may be possible, as contended by counsel, that the rulings of the court below in refusing to dismiss the petition, and afterwards granting leave to amend it, are not entirely consistent with each other, but there is nothing in the record from which we can determine or presume the existence of such an inconsistency. Presumably, the rulings are entirely consistent, as they well might be.

Under the eighth assigned error, it is argued at great length, that the petition, filed as an amended petition, is not an amended, but a substituted petition; that the filing of an

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amended petition carries out of the case the original petition, and the notice and all proceedings based upon the petition, and puts an end to the case except as it may be begun anew and carried on under the amended petition; that the descriptions of the lands in the original petition were insufficient; that the petition filed as an amended petition does not describe the lands as in the original petition; that the descriptions of lands therein were copied from the report of the drainage commissioners, and are insufficient; and that the notice given under the original petition was and is insufficient because the descriptions of the lands therein are the same as in the defective original petition. These are all important questions, and, if properly presented, should receive a careful examination and consideration. It must be apparent, however, that they are not presented by nor under the eighth assigned error. The so-called amended petition was filed some time after the leave to amend was granted, and, when filed, was filed without any kind of objections by any one so far as shown by the record. If the petition so filed is open to the objections urged in argument, or to any one of them, and they constituted any reason why it should not have been filed, appellants, in order to save any question upon the filing, should have objected at the time. Not having objected to the filing, appellants are not in a position to predicate error upon that filing. And if the notice was defective, as contended, there was a mode and time to raise that question. Clearly it is not raised by nor presented under the eighth assigned error.

The third and fourth assigned errors are as follows: "*Third.* That the court erred in overruling appellants' objections to the granting of leave, and permitting appellee to testify that he had been sworn to the affidavit of posting notices. *Fourth.* That the court erred in ordering the clerk to affix his jurat to the prepared affidavit of appellee, as of its date."

On the 14th day of April, 1882, appellee presented his petition to the court, accompanied with an affidavit of the post-

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ing of notices. The court made a finding that it appeared by a proper affidavit on file, that the proper and legal notices had been given. Appellants were defaulted, and the matter was referred to the drainage commissioners. Following the finding that the proper notices had been given, and that this was made to appear by the proper affidavit on file, the affidavit is set out, and appears to have been properly sworn to, with the jurat of the clerk attached. After a full appearance by appellants, and the making of various motions and objections by them, and after the filing of the report by the drainage commissioners, and on the 15th day of January, 1883, appellants moved to modify and set aside the finding and order referring the matter to the commissioners. This motion was based upon the ground that the affidavit on file at the time the court made the finding and order of reference, did not have the jurat of the clerk attached, and hence was not an affidavit at all. Pending this motion, appellee interposed a motion that the clerk be required to attach his jurat as of the 14th day of April, 1882, and offered himself as a witness to prove that upon that day he had sworn to the affidavit before the clerk of the court. The testimony was heard, appellants' motion was overruled, and the clerk was ordered to attach his jurat to the affidavit as of the date of April 14th, 1882, at which time it was in fact sworn to as shown by the uncontradicted testimony of appellee. We think that, without doubt, the court had authority to order the jurat to be affixed, as of the date when it should, and would have been but for the neglect of the clerk. The statute, R. S. 1881, section 4275, required an affidavit in proof of the posting of notices, but it did not prescribe any particular and formal parts of which the affidavit should consist. The jurat of the officer is not the affidavit, nor any part of it. It is simply evidence of the fact that the affidavit was properly sworn to by the affiant.

Going further than we need go in this case, it was held in the case of *Watts v. Womack*, 44 Ala. 605, that it is not es-

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essential to an affidavit that the name of the affiant shall be subscribed. It was said: "The word affidavit is a very broad term. It may mean an oath reduced to writing and subscribed by the party making it, or only an oath in writing without such subscription. The legal definition of the word *affidavit*, is 'an oath in writing, sworn before some judge or officer of a court or other person legally authorized to administer it; a sworn statement in writing. To make affidavit to a thing, is to testify to it upon oath in writing.' 1 Burrill Law Dict. 68; *Shelton v. Berry*, 19 Texas Rep. 154; 3 Black. Com. 304, marg.; 1 Bouvier Law Dict. (12th ed.), pp. 96 and 97." It was further held that the affidavit might have been amended so as to avoid the objections urged against it. To same point, see *Soule v. Chase*, 1 Abbott Pr. N. S. 48.

The question was made in the case of *Kruse v. Wilson*, 79 Ill. 233, that an affidavit required and filed in the case was void, because the name of the officer before whom the oath was taken was not affixed to the affidavit. Testimony was heard to prove that the affidavit was in fact sworn to. It was said: "If an oath was administered, and by the proper officer, as it assuredly was, the law was satisfied, and the mere omission of the clerk to put his name to an act which was done through him as the instrument, should not prejudice an innocent party, who has done all he was required to do. The clerk's omission to write his name, where it should have been written, was not the fault or neglect of the affiant. He signed and swore to the affidavit."

In the case of *Cook v. Jenkins*, 30 Iowa, 452, there was an attempt to overthrow a judgment in attachment, on the ground that the jurat to the affidavit was not signed by the officer. It was said: "The jurat to the affidavit for the attachment is not signed by the officer administering the oath, but it is sufficiently shown that it was, in fact, sworn to."

In the case before us, the court had authority to ascertain whether or not the affidavit had in fact been sworn to, and, having ascertained that fact, it had authority to order the clerk

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to affix his jurat in order that the affidavit might bear upon its face the evidence of its own completeness.

This clearly was not a greater exercise of authority than to make an order allowing a sheriff to amend his return to an execution after the expiration of his term of office; to make an order allowing the clerk to attach his seal to a writ after the sale of property upon it; or to hear evidence, and make an order allowing a clerk to affix his seal to a writ, *nunc pro tunc*, after judgment and the expiration of the term. *Dwiggins v. Cook*, 71 Ind. 579; *Hunter v. Burnsville T. P. Co.*, 56 Ind. 213; *State v. Davis*, 73 Ind. 359.

Our holding in this case is not in conflict with the holding in the case of *Scott v. Brackett*, 89 Ind. 413. There the affidavit was held to be insufficient in substance; here no question of that kind is made. Our conclusion is that the court below was not in error in hearing the evidence and ordering the jurat to be affixed to the affidavit. *Field v. Malone*, 102 Ind. 251.

The fifth and sixth assigned errors are as follows: "*Fifth.* That the court erred in granting leave to appellee to amend his amended petition. *Sixth.* That the court erred in granting leave to, and permitting, appellee to alter and change the report of the commissioners of drainage."

Appellants did not embody the rulings here complained of in a bill of exceptions. When we turn to the record as made by the clerk, we find the statement that leave was granted to appellee to change the description of one tract of land as the same was found in the amended petition and in the report of the commissioners, but there is nothing to show that such a change was ever made. Unless it was made, the simple granting of leave could in no way injuriously affect appellants. There is, therefore, nothing available for appellants in the fifth and sixth assigned errors.

The last assigned error relied upon by appellants is the overruling of their motion for a new trial. This involves the single question of the sufficiency of the evidence to sustain

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the assessments against appellants' lands. The evidence is sharply conflicting. It is well settled that in such cases this court will not reverse the judgment upon the weight of the evidence.

After a careful examination of all the questions presented for decision by the assignment of errors and the record, as it comes before us, we are constrained to hold that there is nothing upon which this court would be justified in reversing the judgment. The judgment is, therefore, affirmed, at the costs of appellants.

Filed Oct. 14, 1885.

No. 11,786.

JACKSON v. THE STATE, FOR USE OF LINDLEY, DRAINAGE
COMMISSIONER.

PLEADING.—*Complaint to Enforce Ditch Assessment.*—*Notice.*—A complaint to enforce the collection of a ditch assessment, which fails to allege that defendant had notice of the proceedings, or that any notice whatever was given, is bad on demurrer; and the filing of a copy of the proceedings as an exhibit, from which it appears that due notice was given, will not make the complaint good.

SAME.—*Exhibits.*—Instruments which are not the foundation of a pleading should not be made exhibits, and, if they are, they cannot be deemed a part of the pleading.

From the Howard Circuit Court.

J. W. Kern, B. F. Harness, J. C. Blackledge and W. E. Blackledge, for appellant.

M. Garrigus, for appellee.

ELLIOTT, J.—The complaint, the sufficiency of which is challenged by demurrer, seeks to enforce the collection of an assessment for the construction of a ditch.

It is not averred in the body of the complaint, that the appellant had notice of the proceedings, or that any notice whatever was given, and for this reason the appellant's counsel insist that the court erred in overruling the demurrer.

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The appellee attempts to parry the attack by the argument that the proceedings are set forth as an exhibit, and it there appears that notice was given. We do not think the appellee's position can be maintained. It has been very many times decided that instruments which are not the foundation of the pleading should not be made exhibits, and that, if they are, they can not be deemed part of the pleading. The practice of crowding the record with evidence in the form of exhibits has often been condemned as a censurable one. The proceedings of the officers and viewers in laying out and constructing a ditch may be evidence, but it is not proper to plead evidence. It is not the duty of the court to examine evidence set forth in a pleading to ascertain whether facts may be inferred; on the contrary, it is the duty of the pleader to state traversable facts positively and directly. It has been held that the assessment is the foundation of the action to enforce collection of benefits, and that it must be made an exhibit. *State, ex rel., v. Myers*, 100 Ind. 487; *State v. Turvey*, 99 Ind. 599; *Neiman v. State*, 58 Ind. 88; *Roberts v. State*, 97 Ind. 399; *Crist v. State, ex rel.*, 97 Ind. 389; *Albertson v. State, ex rel.*, 95 Ind. 370; *Smith v. Clifford*, 83 Ind. 520. But we do not think that a plaintiff in such a case as this can make a good complaint by making exhibits of instruments not constituting the foundation of his complaint. If this were so, there need be no averments at all in the body of the complaint as to what proceedings were had, and the court would be compelled to look through a long and complicated record, affecting many interests and many persons, to ascertain what the facts were. Good pleading requires that the material facts shall be concisely and directly stated in the body of the complaint.

It was essential to the plaintiff's case to show notice, and this material fact should have been directly alleged. Its absence makes the complaint bad. *Wishmier v. State*, 97 Ind. 160, see p. 163; *Neiman v. State, supra*; *Shaw v. State*, 97 Ind. 23.

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The omission to aver notice is the omission of a most material matter, for notice is essential to the validity of the proceedings. It has, indeed, been many times held that the Constitution requires notice, and what the Constitution requires the Legislature can not dispense with even by express statute; but this has not been attempted, for notice is required by the statute upon which the proceedings are founded.

Judgment reversed.

Filed Oct. 16, 1885.

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| 159 | 270 |

 No. 12,149.

WELCH ET AL. v. BOWEN.

COUNTY COMMISSIONERS.—*Animals Running at Large.*—*Police Regulation.*—*Constitutional Law.*—The act of May 31st, 1852, authorizing county boards to determine what animals shall be allowed to run at large and pasture on the public commons and uninclosed lands, is not an infringement of section 21, art. 1, of the Constitution, in regard to the taking of the property of others without just compensation first paid or tendered, but confers a power in the nature of a police regulation.

SAME.—*Power to Change or Repeal Order Continuing.*—The power to pass orders or regulations in respect to the running at large of animals, conferred on county boards by the act of 1852, is administrative in character, is continuing, and is not exhausted by being exercised once, and such boards may change, modify or repeal an order when once made, as often as the public interest may demand.

SAME.—*Municipal Corporation.*—*Power to Change or Repeal By-Laws.*—*Vested Right.*—The power to pass by-laws, ordinances, or regulations affecting the government of a municipal corporation carries with it by implication the power to modify or repeal such by-laws, ordinances and regulations, unless the power is restricted in the law conferring the right, or unless such change or repeal would affect a vested right under an order or regulation lawfully adopted.

From the Switzerland Circuit Court.

J. B. McCrellis and G. S. Pleasants, for appellants.

J. D. Works and L. O. Schroeder, for appellee.

MITCHELL, C. J.—The record in this case discloses that

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Bowen brought an action before a justice of the peace to recover the possession of two cows and one calf, of which it was alleged he was the owner. After a trial before the justice, the case was taken by appeal to the Switzerland Circuit Court, where, upon an agreed statement of facts, the plaintiff below had judgment for the recovery of the property in controversy.

The facts as agreed upon show that, on the 21st day of April, 1884, Bowen, being the owner of the animals described, turned them out to graze and permitted them to run at large. The animals strayed upon lands owned by Welch, which were not inclosed by a fence sufficient to prevent the ingress of cattle. Welch and Grenat, citizens of the township, took them up, and the owner being unknown, they posted notices according to law at three of the most public places in the township. Subsequently, upon discovering that the cattle belonged to Bowen, they gave written notice to him, and demanded that he pay them \$1.50 for each animal impounded. It is agreed that, before bringing the suit, Bowen neither paid nor tendered the damages or cost of taking up the cattle. It was further agreed that, on June 14th, 1853, the board of commissioners of Switzerland county made and entered of record an order permitting all cattle, except bulls over two years old, to run at large on the public commons in all of the townships of Switzerland county. On March 8th, 1883, upon the petition of numerous citizens of the county, and upon the representation that the Legislature had recently before that repealed the law under which county commissioners were authorized to pass orders allowing animals to run at large, the board, after reciting the passage of the previous order, entered of record the following: "And it is now ordered by this board, that the aforesaid order of June 14th, 1853, as recorded in book 'B,' page 484, of the commissioners' record, be and the same is hereby repealed, from and after this day."

It was claimed that the defendants were entitled to hold possession of the cattle until their costs and charges were

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paid, and it was agreed that the question to be presented to the court for decision was the legality of the order of the board of commissioners repealing the order of June 14th, 1853. After the finding in favor of the plaintiff below, the defendants moved for a new trial, for causes assigned. This was overruled and excepted to, and upon appeal this ruling is assigned for error.

The case is elaborately argued on behalf of the appellant, but we are without the aid of a brief or other argument for the appellee.

It is contended that the act of the Legislature, approved May 31st, 1852, under the supposed authority of which the county board passed the original order, was void, as being an infringement of section 21, article 1, of the Constitution of the State. The argument is, because boards of commissioners are authorized to direct by an order that animals may run at large in the several townships, and pasture on the public commons and uninclosed lands of others, that thereby the taking of property of others is authorized without just compensation being first paid or tendered.

It is not readily apparent that the enactment in question is subject to the objection urged. Without the regulation for which the statute provides, the common law rule obtains, which requires the owner of animals either to confine them upon his own premises or answer in damages for any trespass they may commit upon the lands of others. The force of the regulation seems to be, not to confer a right in or upon the lands of one person to another, but to prescribe what kind of animals may be permitted to pasture on the public commons and uninclosed lands, without subjecting their owner to liability for trespass. In *Myers v. Dodd*, 9 Ind. 290, it was held to be within the province of the Legislature to withhold a remedy for injury done by cattle entering upon lands of another, where such lands were not lawfully fenced. *Clark v. Stipp*, 75 Ind. 114.

As a police regulation, we think it competent under the

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law in question, for the commissioners to prescribe what kind of animals may run at large. The effect of the regulation is neither to take nor authorize the taking of the property of another. The most that it does is to deprive the owner of the land of the right to prosecute for a trespass so long as he sees fit to leave his lands uninclosed or fails otherwise to protect it from the incursions of animals having the right to run at large. Notwithstanding the order of the county board, the owner of the land would have complete dominion over his property, and might make any use of it he chose. He might inclose it, or in any lawful manner keep his animals on and all others off. The inconvenience which he may suffer is, not that others acquire any right to his property, but that they are not compelled to confine their animals upon their own, and that he is deprived of the right to sue for damages for trespass upon his uninclosed lands. *Griffin v. Martin*, 7 Barb. 297; *Hardenburgh v. Lockwood*, 25 Barb. 9. Laws of similar import have existed in this State for more than half a century, and although the reasons for their continuance may have measurably ceased, the policy of continuing the law is for the Legislature and not the courts.

The remaining question is, was it competent for the board of commissioners in 1883, to repeal the order adopted by their predecessors in 1853? That it was, we think there can be no doubt. Regulations which may have been suited to the condition of society in 1853 may, in the progress of thirty years, have become entirely unsuited to the state of things then existing. It would hardly do to suppose that the Legislature did not anticipate the progress of events.

Under section 10 of article 6 of the Constitution, it was competent for the General Assembly to confer upon the boards doing county business powers of a local administrative character. Pursuant to this provision, the Legislature, by the act approved May 31st, 1852, conferred upon the boards of commissioners the power, and made it their duty, by order or ordinance, to direct what kind of animals might be allowed

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to run at large within the bounds of the respective townships. This power was administrative in its character, and was subject to be exercised, according to the discretion of the board, of its own motion. The time and manner of its exercise were left to their own judgment, and there is in the act itself no restriction or limitation upon their power to change, modify or repeal an order when once made. If any restriction upon their power in that regard exists, it must be found in the general rules of law which regulate the power of similar bodies, when exercising analogous duties.

The general rule is that the power to pass by-laws, ordinances, or regulations affecting the government of a municipal corporation carries with it by implication the power to modify or repeal such by-laws, ordinances and regulations unless the power is restricted in the law conferring the right.

The limitation to which this power is subject is that the repeal or change can not be made so as to affect any vested right lawfully acquired under an ordinance or regulation lawfully adopted. 1 Dillon Mun. Corp., section 314; *City of Kansas v. White*, 69 Mo. 26.

In *Rex v. Ashwell*, 12 East, 22, it was said by BAYLEY, J.: "And this by-law only operates upon the body at large so long as they" (the aldermen) "think fit to continue it: it is liable to be reconsidered by them at all times: it only binds their successors so long as their successors choose to be bound by it: for the same body that made the by-law may repeal it."

It can not be necessary to elaborate or fortify this proposition further; that this is the general rule can not be doubted. Is it applicable to orders or regulations adopted by county commissioners when acting in an administrative or *quasi* legislative capacity?

The authorities relied on as denying this power are cases in which the action of the board was either judicial in its nature, or where some special statutory power was exerted, the time and mode of its execution being prescribed by stat-

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ute. Where the board exercises a power judicial in its character, and individual rights become vested or affected as a result of its action, or where an appeal is allowed, it can not set aside or annul its action unless authorized to do so by express statute. Where, however, it exercises functions which are administrative or ministerial in their nature, and which pertain to the ordinary county business, and the exercise of such functions is not restricted as to time or manner, it is by implication invested with the ordinary attributes of other similar bodies, and may in like cases modify or repeal its action. Having been invested with the power to pass orders or regulations in respect of the running at large of animals, such power is continuing, and is not exhausted by being exercised once. *Goszler v. Corporation of Georgetown*, 6 Wheat. 591.

One board of commissioners by the exercise of this function could not deprive its successors from exercising it again and again, as often as the public interest might demand. *East Hartford v. Hartford Bridge Co.*, 6 How. 511, 534.

The judgment of the circuit court is reversed, with costs, with directions to the court below to enter judgment on the agreed statement of facts in accordance with this opinion.

Filed Oct. 14, 1885.

No. 12,252.

WILSON ET AL. v. GALEY, GUARDIAN.

PLEADING.—*Demurrer for Fifth Cause Calls in Question Sufficiency of Facts and Right of Action in Plaintiff.*—A demurrer to a complaint for the fifth statutory cause (section 339, R. S. 1881,) calls in question not only the sufficiency of facts stated to constitute a cause of action, but also a cause or right of action which the plaintiff in his own name may sue upon and enforce.

GUARDIAN AND WARD.—*Action for Waste Must be Brought by Ward and not by Guardian.*—Under section 287, R. S. 1881, which provides that "A person seized of an estate in remainder or reversion may maintain an

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action for waste or trespass, for injury to the inheritance, notwithstanding an intervening estate for life or years," a guardian can not maintain such action for his ward, but it must be brought by the ward in his own name, by next friend, as provided by sections 255 and 256, R. S. 1881.

From the Montgomery Circuit Court.

E. C. Snyder and *R. J. Greene*, for appellants.

G. W. Paul, *J. E. Humphries*, *W. W. Thornton* and *W. Reeves*, for appellees.

HOWK, J.—This was a suit by the appellee, as guardian of certain minors, against the appellants, in a complaint of two paragraphs. The object of the suit was to recover damages for waste alleged to have been committed, and to enjoin the commission of further waste by the appellant Sophia B. Wilson, as tenant for life, and her husband, on certain real estate owned in fee by appellee's wards, in Montgomery county. The cause was put at issue and tried by the court, and a finding was made for appellee, guardian as aforesaid, assessing his damages in the sum of \$75. Over appellants' motions for a new trial and in arrest, the court rendered judgment on its finding as prayed for in appellee's complaint.

A number of errors are assigned by appellants, in this court, but those chiefly relied upon by their counsel, in argument, are the overruling of their demurrers to each paragraph of appellee's complaint. The evidence is not in the record.

In the first paragraph of his complaint, the appellee alleged that his wards were the owners of certain real estate, particularly described, wherein the appellant Sophia B. Wilson had a life-estate for and during her own life, and then had possession thereof as such life-tenant; that, in disregard of the rights of appellee's wards, appellant Sophia B. Wilson had unlawfully cut down nine "large, good, sound and valuable oak trees, of sound, good and valuable timber," and had cut up "nine fallen but sound, good, large and valuable

timber oak trees," and had converted "said oak trees into staves and heading material," and had sold and converted the same to her own use and benefit; that such trees and the timber thereof were in no wise needed for the improvement of such real estate, nor were they so used; nor were they needed or used for firewood or for repairing the buildings on such land; nor had they, in any manner whatever, become decayed, nor were they decaying; and that such trees were each of the value of \$35.

The appellee further averred, that appellant Sophia B. Wilson had sold certain other large and valuable oak trees, of good and valuable timber (the number and value of which appellee could not give), off of such real estate, and was then threatening to cut down such trees and haul them away and dispose of the timber thereof; that, in all such transactions, the appellant Michael Wilson had counselled, aided and abetted his wife and co-appellant, and assisted her in cutting down such trees, and had received part of the proceeds of the sale thereof, and was then threatening with her to aid and assist her in cutting down such other trees so sold by her. Wherefore, etc.

The second paragraph does not differ materially, in its averments, from the first paragraph of complaint, except in this, that the second paragraph is more specific in its statement of facts than the first paragraph of complaint.

In their brief of this cause, the appellants' learned counsel object to the sufficiency of the first paragraph of complaint, upon the following grounds:

1. It does not allege damage to an estate which appellee holds.
2. It does not state *where* the damage is.
3. It does not allege that the trees which were cut were cut from land in which appellee had any estate.
4. It does not allege that the damage complained of was on account of the action of the appellants.

Appellants' counsel also urge the same objections, with the

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exception of the third one, to the sufficiency of the second paragraph of complaint.

In *Pence v. Aughe*, 101 Ind. 317, it was held by this court, and correctly so, we think, that a demurrer to a complaint for the *fifth* statutory cause of demurrer (section 339, R. S. 1881,) calls in question not only the sufficiency of the facts stated in the complaint to constitute a cause of action, but also a cause or right of action which the plaintiff, in his own name may sue upon and enforce. In section 287, R. S. 1881, in force since September 19th, 1881, it is provided as follows: "A person seized of an estate in remainder or reversion may maintain an action for waste or trespass, for injury to the inheritance, notwithstanding an intervening estate for life or years." This section of the statute seems to have been enacted for the first time, in this State, in the civil code of 1881, no similar section being found in the civil code of 1852, nor in any other statute of this State so far as we are advised. Yet, it has always been the law in this State, that the owner in fee simple of real property, in remainder or reversion, might recover of the life-tenant or tenant for years damages for waste committed, or might upon a proper showing enjoin the commission of further waste. *Dawson v. Coffman*, 28 Ind. 220; *Miller v. Shields*, 55 Ind. 71; *Robertson v. Meadors*, 73 Ind. 43.

Recurring to section 287, above quoted, it will be seen that, in language too plain for construction or to be misunderstood, it gives the right or cause of action for waste or trespass, for injury to the inheritance, to the person seized of the estate in remainder or reversion. It was not alleged by the appellee Galey, in either paragraph of his complaint, that he was seized of any estate in remainder or reversion, or otherwise, in the real estate whereof the appellant Sophia P. Wilson was averred to be in possession as tenant for her own life. On the contrary, the appellee alleged that Sophia E. Armstrong and Emma Armstrong, who were minors, and of whom he was the legal guardian by the appointment of the proper court,

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were the persons seized in fee simple of the real estate, in remainder or reversion, whereof the appellant Sophia P. Wilson had possession as the life tenant thereof for and during her own life. Under the allegations of each paragraph of the complaint, and under the provisions of section 287, above quoted, we are of opinion that the appellee Galey had no cause of action, either in his own right or as guardian, against the appellants, or either of them. Upon the facts stated in each paragraph of complaint, the right or cause of action, if any, against the appellants, or either of them, is shown to be in Sophia E. Armstrong and Emma Armstrong; and they, in their own proper names, by their next friend, are authorized by the statute to maintain a suit upon such cause of action.

In section 255, R. S. 1881, in force since September 19th, 1881, it is provided as follows: "When an infant shall have a right of action, such infant shall be entitled to bring suit thereon, and the same shall not be delayed or deferred on account of such infant not being of full age." The next section of the code (section 256) provides for the appointment of a *prochein ami*, or next friend, of an infant sole plaintiff, who shall be responsible for costs. It will be seen that the code contemplates and provides that whenever an infant has a cause of action he shall bring suit thereon in his own name, and such suit shall not be delayed or deferred on account of his infancy. This is the general rule. An exception to this rule is found in the *fifth* clause of section 2521, R. S. 1881, in force since May 6th, 1853, defining the duties of the guardian of a minor, and making it his duty, among others, to "collect all debts due such ward." By strong implication, though not in express terms, we think this provision of the statute authorizes a guardian, if necessary, to sue in his own name for the collection of a debt due his ward, though this point we need not and do not decide. This exception to the general rule, however, has no application to the case in hand.

For the reasons heretofore given we are of opinion that

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the trial court erred in overruling the appellants' demurrer to each paragraph of appellee's complaint.

The judgment is reversed, with costs, and the cause is remanded, with instructions to sustain the demurrer to each paragraph of the complaint, and for further proceedings.

Filed Oct. 15, 1885.

No. 12,078.

SUMMERS v. THE BOARD OF COMMISSIONERS OF DAVIESS COUNTY.

COUNTY COMMISSIONERS.—*Negligence.*—*Physician for Poor.*—Where it does not appear that a board of commissioners did not exercise care and diligence in the selection of a physician for the poor, there can be no negligence.

SAME.—*Governmental Duties.*—*Principal and Agent.*—*Respondent Superior.*—Where the duties delegated to officers selected by public corporations are political or governmental, the relation of principal and agent does not exist, and the maxim of *respondent superior* does not govern.

SAME.—*Police Power.*—Counties are instrumentalities of government, and are not liable for injuries caused by the negligence of the commissioners in the selection of an unskilful or incompetent physician for the care of the poor.

From the Daviess Circuit Court.

J. H. O'Neill and *D. J. Hefron*, for appellant.

J. W. Ogdon and *M. F. Burke*, for appellee.

ELLIOTT, J.—The appellant alleges in her complaint that she fell and broke her leg; that she was poor and unable to procure a surgeon to attend her, and that James F. Parks was employed by the county to give medical and surgical attention to those who were too poor to employ physicians and surgeons. It is also averred "that James F. Parks, at the time he was so employed, was not a skilful physician having a knowledge of surgery, but, on the contrary, was unskilful in the profession, and had no knowledge of surgery, and was

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incompetent to intelligently perform the duties of a physician and surgeon." It is further alleged that Parks was called upon to attend the appellant, and that his want of knowledge and lack of skill were such that he so unskillfully and improperly treated her as to do her great injury.

If, in any case, a recovery could be had against the county for the unskillful and improper manner in which a surgeon treated an injured poor person, it is clear that there can be none in this, for it does not appear that the board of commissioners did not exercise care and diligence in the selection of the physician for the poor. Where care and diligence are used in the selection of a physician the officers representing the county have done their duty, and where there is no breach of duty there can be no negligence. Mere errors in judgment do not constitute negligence.

We put our decision on broader grounds. The commissioners are public officers, charged with the performance of public duties, and in the performance of public duties they are not mere agents. It is true that officers occupying positions similar to those held by county commissioners are often spoken of as agents, and, in some cases, it is, perhaps, proper to treat them as agents. But even when such officers are regarded as agents, a broad and important difference is noted between public and private agents, and essentially different rules govern the two classes. *Newman v. Sylvester*, 42 Ind. 106; *Azt v. Jackson School Tp.*, 90 Ind. 101; *Reeve School Tp. v. Dodson*, 98 Ind. 497; *Union School Tp. v. First Nat'l Bank*, 102 Ind. 464; *Platter v. Board, etc., post*, p. 360.

Where the duties delegated to officers elected by public corporations are political or governmental, the relation of principal and agent does not exist, and the maxim *respondeat superior* does not govern. This rule is illustrated in many cases. In the case of *Ogg v. City of Lansing*, 35 Iowa, 495 (14 Am. R. 499), it was held that a city was not liable for the negligence of persons placed in charge of a small-pox hospital which the city had established. It was said in the course of the opinion

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in that case, that "It is impossible to conceive of the endless complications and embarrassments which such a doctrine would involve, and of the extent to which the public interests would thereby suffer. It is safe to assume that if such were recognized as the law, no town would voluntarily assume corporate functions, and that every industrial and commercial interest would become paralyzed."

The recent case of *Bryant v. City of St. Paul*, 21 Central L. Jour. 33, is directly in point. It was there held that a city was not liable for the misfeasance of members of the board of health selected by the city. Many authorities are cited in the note appended to that case, and from them it appears that the doctrine that public corporations, to whose officers governmental powers are delegated, are not responsible for the negligence of their officers in the exercise of these governmental powers. This doctrine has long prevailed in this State. *Brinkmeyer v. City of Evansville*, 29 Ind. 187; *Robinson v. City of Evansville*, 87 Ind. 334 (44 Am. R. 770); *Faulkner v. City of Aurora*, 85 Ind. 130 (44 Am. R. 1); *City of Lafayette v. Timberlake*, 88 Ind. 330.

We have many cases holding that counties, townships and cities are instrumentalities of government, and it must, therefore, be true that where they act simply as the local government they act for the State. As the State is not liable for the acts of its officers, neither can the public corporations be held liable for the acts of its officers in the exercise of political powers. *Robinson v. Schenck*, 102 Ind. 307; *Justice v. City of Logansport*, 101 Ind. 326; *Kistner v. City of Indianapolis*, 100 Ind. 210.

There is no more reason for holding counties liable for the negligence of the commissioners in the exercise of the governmental functions delegated to them, than there is for holding cities liable for the acts of their firemen or police officers, or for holding counties and townships responsible for the torts of sheriffs and constables. In providing for the care of the poor, a police power which resides primarily in the sover-

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eignty is exercised, and neither the sovereign nor the local governing body to whom such a power is delegated is responsible for the misfeasance of its officers.

Judgment affirmed.

Filed Oct. 14, 1885.

No. 11,920.

FRY ET AL. v. LOUISVILLE, NEW ALBANY AND CHICAGO RAILWAY COMPANY.

RAILROAD.—*Bill of Lading.—Contract.*—One who sues upon a contract contained in a bill of lading must recover, if at all, upon that contract.

SAME.—*Common Carrier.—Shipment at Reduced Rates.—Action for Overcharge.—Answer.*—A bill of lading for a car load of freight from Crawfordsville, Indiana, to Jamestown, Dakota, contained a guaranty that the rate should not exceed that specified in the bill, but it was stipulated that the rate was to be \$120 per car, and that the articles shipped were "for farm purposes." At the place of destination, which was on a connecting railroad owned by another company, the latter demanded, and was paid under protest, \$235 before delivering the property to the shipper. To a complaint against the contracting company on the contract, and for money had and received, to recover the overcharge, it was answered, that by an arrangement with the company owning the connecting road, the latter would carry freight for farm purposes at the reduced rate given, and that the shipper falsely represented the property to be for farm purposes, upon discovering which fact the usual rate was charged.

Held, that the answer is sufficient on demurrer.

From the Montgomery Circuit Court.

E. C. Snyder, for appellants.

A. D. Thomas, for appellee.

ZOLLARS, J.—Appellants brought this action to recover from appellee the amount of an alleged overcharge on freight.

Their case, as made in the first paragraph of the complaint, is as follows: They delivered to appellee for shipment one car load of horses, buggies and seed oats. Appellee undertook and agreed in writing to transport and carry, and cause

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*Fry et al. v. Louisville, New Albany and Chicago Railway Company.**

to be transported and carried, said car load of horses, buggies and seed oats from Crawfordsville, Indiana, to Jamestown, Dakota, for the sum of \$120, and, as evidence of that agreement, delivered to appellants a receipt and contract in writing, which is set out in full as a part of this paragraph of complaint. The contract thus set out is what is commonly known as a bill of lading. The stipulations in the bill of importance here are, that the transportation was to be made upon the terms and conditions contained in the bill, and a guaranty that the rate of freight for the transportation should not exceed the rates specified in the bill. Under the head of "Marks and Consignees" is the following: "This bill of lading is from Crawfordsville, Indiana, to Jamestown, Dakota. The rate of freight to be \$120 per car." Under the head of "Description of Articles" is the following: "1 car horses, buggies, O. K. and seed oats. * * For farm purposes. Pass man in charge. This car to go through." Written across the bill of lading is the following: "Read this contract." The horses, buggies and seed oats were safely transported to the place of destination over appellee's road and connecting road. At the place of destination, appellants presented the bill of lading and demanded of the railroad company in charge, the horses, buggies and seed oats, at the same time tendering \$120, the stipulated amount of freight. This the company refused and demanded \$235, which appellants were compelled to pay in order to get their property, and which they did pay under protest. To recover back the difference between this amount and the amount agreed upon, this action was brought.

The second paragraph of the complaint is for money had and received. The ground upon which the demand is predicated is not specifically stated.

To this complaint, appellee filed an answer in one paragraph. While it neither expressly admits nor denies the averments in the complaint, it is in the nature of a confession and avoidance. The substance of it is, that appellee

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had an arrangement with companies owning connecting lines of railroad, under which they would receive from its line and forward to Jamestown, Dakota, at reduced rates, all freights that were being forwarded upon through contracts "for farm purposes;" that said companies, owning the lines over which the car of horses, etc., was transported, would have carried it for such a sum; that there would have been no charge, additional to the amount stated in the bill of lading, had the horses, buggies and seed oats been, in fact, for farm purposes; that appellants represented to appellee's agents, at the time the contract of shipment was made, that the horses, etc., were for farm purposes; that the representations were false, and that said horses, etc., were not shipped "for farm purposes," as represented by appellants, and as stipulated in the contract sued on; that it was owing to the discovery of the fact that said horses, etc., were not forwarded to Dakota for farm purposes, that the additional charge was made for carrying them, and that the additional charge, together with the \$120 agreed upon, was only the usual price for that class of freight from Crawfordsville to Jamestown, Dakota.

The overruling of a demurrer to this answer is the assigned error upon which appellants rely for a reversal of the judgment.

It will be observed that it is alleged in the first paragraph of the complaint, that the contract, as to the amount to be charged and paid for the carriage, was reduced to writing. The bill of lading containing that contract was filed with and as a part of the complaint. The contract is very clearly a contract in writing, and just as clearly the right of recovery under the first paragraph of the complaint, if there is a right of recovery, rests upon, and must rest upon that written contract. *Indianapolis, etc., R. R. Co. v. Remmy*, 13 Ind. 518; *Hall v. Pennsylvania Co.*, 90 Ind. 459; *Bartlett v. Pittsburgh, etc., R. W. Co.*, 94 Ind. 281.

But for the special agreement in the bill of lading as to the amount to be paid for the carriage, appellants would be unconditionally bound to pay the customary and usual charges

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for the carriage of the class of property shipped by them. The validity of that contract is not questioned by either side. They both assert its validity; the one by suing upon it, and the other by defending under it. If, then, the stipulation as to amount to be charged for the carriage is a part of the contract of shipment and binding upon the parties, just as clearly the stipulation that the horses, etc., were for farm purposes, is also a part of the contract and binding upon them. There is no question here of a stipulation being inserted in a bill of lading at such a place, or in such a manner, as to escape the ready observation of or to mislead the shipper, nor of a stipulation being so written that it can not be read or understood. Here, the stipulation that the horses, etc., were for farm purposes, was written out in full, and for aught that appears, plainly written. It is side by side with the stipulation as to the amount to be charged by appellee, and paid by appellants; and more than this, the stipulation was put into the contract upon the representation by appellants that the horses, etc., were for farm purposes. Appellants, therefore, had knowledge of the stipulation, both from the bill of lading and their own representations. Having made the representations, that the horses, etc., were for farm purposes, it could not be reasonably said that they did not understand the meaning of the stipulation in the bill of lading. The bill of lading was and is the written contract of the parties, and by its terms their rights and liabilities must be measured. The reasonable interpretation of it is, that the horses, etc., were being shipped to Dakota for the purpose of being there used for farm purposes. This is the substance of the representations made by appellants. The substance of the answer is, that appellee's agents so understood the representations, and that, in consideration of the fact that the horses, etc., were to be so used, appellee agreed to transport them for \$120, instead of \$235, the usual and ordinary charges. We know of no reason why the railroad company may not as well insist upon the stipulation that the horses,

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etc., were for farm purposes, as that appellants may insist that the amount to be charged and paid for the carriage shall be \$120 and no more.

It is alleged in the answer that the representations that the horses, etc., were for farm purposes, were false, and that they were not being shipped to Dakota to be there used for farm purposes. This, of course, the demurrer admits, as it does all other facts that are well pleaded in the answer.

It is insisted by appellants' counsel, that the stipulation in the bill of lading, that the horses, etc., were for farm purposes, was and is a condition subsequent, and hence could not be broken until after delivery of the horses, etc., to appellants, and their use for purposes other than farm purposes. This might be granted without overthrowing appellee's defence. If, in advance of such delivery, appellants had declared that they would not use the horses, etc., for farm purposes, nor so dispose of them that they might be so used, it would seem to be clear that the carrier would not be bound to surrender the property on payment of the reduced freight, and take the risk of thereafter recovering the proper and usual rates. It is averred in the answer, and admitted by the demurrer, as already stated, that the property was not being shipped to be used in Dakota for farm purposes. For aught that appears, that fact may have been established by the declarations or other acts on the part of appellants. However that might be, the demurrer admits it to be a fact that the property was not being shipped for the purpose of being used for farm purposes. This fact being admitted, it must follow that appellants are not entitled to the reduced rate stipulated in the bill of lading, and that appellee was and is entitled to charge the usual and customary rates. We think it clear, too, that the answer fully meets and answers the second paragraph of the complaint. All of the facts stated in the answer are applied in answer to the second paragraph of the complaint by the averment, "that the second paragraph of said complaint for money had and received is for the same

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alleged overcharge of freight, as averred in the first paragraph of said complaint." We conclude that the answer is sufficient to withstand the demurrer directed against it, and that hence the judgment must be affirmed. The answer, however, is by no means a model plea, and is evidently not the result of the pleader's best efforts.

Judgment affirmed, with costs.

Filed Oct. 16, 1885.

No. 12,120.

TALMAGE ET AL. v. BIERHAUSE ET AL.

SET-OFF.—*Demands Must be Mutual.*—*Finding by Jury.*—To make one demand a set-off against another, both must mutually exist between the same parties; but where the mutuality is disputed, and there is evidence from which the jury may find that the transactions were between the same parties, its finding of such fact will not be disturbed.

PLEADING.—*Defect of Parties to Answer.*—*Waiver.*—*Practice.*—A defect of parties to an answer which presents a set off or other claim which might constitute an independent cause of action, must be taken by demurrer when apparent, or by plea when not apparent, or it will be deemed waived.

PRINCIPAL AND AGENT.—*Agent's Authority to Warrant.*—*Presumption.*—An agent, upon whom general authority to sell is conferred, will be presumed to have authority to warrant unless the contrary appears.

SAME.—*Sale of Commodity not Present.*—It will be presumed, in the absence of a showing to the contrary, that a warranty is not an unusual incident to a sale by an agent for a dealer in a commodity, where the thing sold is not present and subject to the inspection of the purchaser.

SAME.—*When Principal Liable Notwithstanding Instructions to Agent.*—Though the authority of the agent be restricted by instructions from his principal, the latter will be bound by a warranty attending a sale by the agent unless the purchaser knew of such restriction.

From the Knox Circuit Court.

W. H. De Wolf and *S. N. Chambers*, for appellants.

F. W. Viehe and *M. J. Niblack*, for appellees.

MITCHELL, C. J.—On the 10th day of June, 1882, John

Talmage et al. v. Bierhaue et al.

T. Talmage and Daniel Talmage, trading under the firm name of Dan Talmage's Sons, in the city of New York, sold and delivered to E. Bierhaue & Son, in Vincennes, Indiana, twenty bags Rangoon rice, for the price of \$242.80.

To a complaint on the account for goods sold and delivered, the defendants answered specially in two paragraphs, in both of which it was averred that on the 24th day of March, 1882, the plaintiffs, for a stipulated price, agreed to sell and deliver to the defendants another lot of rice, which was to be of good merchantable quality; that they guaranteed that the rice to be delivered would not spoil, nor become musty, unmerchantable or unfit for use, before the end of the summer then next ensuing, if kept in a dry, cool place; that in pursuance of the agreement so made, the plaintiffs delivered the rice, for which the defendants, upon receipt of it, paid the stipulated price. It is averred that notwithstanding the rice was kept in a dry, cool place, it became musty, unmerchantable and unfit for use before the end of the summer, to the defendants' damage in the sum of four hundred dollars. In addition to the foregoing, the second paragraph contained the averment that the rice which had been purchased and paid for was not of good merchantable quality when delivered. This paragraph offered to set off so much of the damages growing out of the first purchase as equalled the plaintiffs' claim, and prayed judgment for the excess.

Separate demurrers were overruled to the answers, and upon issues made trial was had by a jury, resulting in a verdict for the defendants for \$110.80.

The only assignment of error discussed by appellants' counsel is that which brings in review the rulings of the court in overruling a motion for a new trial. This motion assigned for cause that the verdict was contrary to law, and was not supported by sufficient evidence.

The evidence is in the record, and from it the following facts may be epitomized: At the time the several sales were made the firm of Dan Talmage's Sons, composed of the in-

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dividuals first above mentioned, was doing business as wholesale rice merchants in the city of New York. The same persons, with one C. J. Huguenin, composed a firm trading as wholesale rice merchants, under the name of Dan Talmage's Sons & Co., in Charleston, South Carolina. The order for the rice, about which the controversy arose in this case, was taken from the defendants, who are wholesale jobbers in Vincennes, by one John S. Talmage, a travelling salesman employed by the New York house, but who also habitually took orders for the house in Charleston. All orders taken by him were sent to the New York house. It appeared in evidence that the defendants had frequently dealt with the New York house before, and it did not appear that they knew of the Charleston firm, or, if they did, that it was differently constituted from that in New York, although they were told at the time the order was given, which embraced both foreign and domestic rice, that the domestic rice would come from Charleston, and the foreign rice from New York. At the time the order was taken, the plaintiffs' salesman entered in the defendants' memorandum book of orders the following: "Dan Talmage's Sons & Co., 50 bbls. R. rice, 6½, 10 bgs. Rangoon, 5½." It does not appear directly who forwarded this order to the Charleston house, but it may be inferred from the fact that the travelling salesman testified that he forwarded all orders taken by him to the New York house, that it was forwarded from the New York to the Charleston house. The foreign rice was forwarded from New York and the domestic, about which the controversy arose, from Charleston. The New York firm drew two separate drafts, and received payment for both shipments. The New York firm claims to have collected the Charleston shipment as agents for the Charleston firm. At the time the order was given, the evidence tends to show that one of the defendants inquired of the plaintiffs' salesman whether his rice would keep. He replied that "he would guarantee it to keep all summer if kept in a dry, cool place." The rice was received at Vincennes some time dur-

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ing the month of April, 1882. One barrel of it was examined casually on its arrival, and seemed to be all right, and according to the sample exhibited at the time of the sale. The whole was put in a dry, cool place, and not further examined until some time in July following, when it was found to be musty and damaged.

There was evidence tending to show that the rice was of merchantable quality when delivered at Charleston. Further than as above stated, there was no testimony relating to its condition or quality when received at Vincennes.

It is contended by the appellant, that because the rice, which was guaranteed to keep during the summer, was sold to the defendants by the Charleston firm, which was composed of one member different from that in New York, from whom the rice for the price of which suit was brought was received, the claim for damages growing out of the sale of the one can not be set off against the price of the other.

While it is true, that in order to make one demand a set-off against another, both must mutually exist between the same parties, there is nevertheless evidence in this case from which the jury may have found that both transactions were had with the New York firm. Confessedly, the order for the rice which became unmerchantable was taken by the plaintiffs' agent, together with an order for some foreign rice, and the inference is that the whole order was sent by him to the New York house, to which payment was made for the whole. Under the circumstances, the whole transaction could as well have been regarded as having occurred with the New York firm, as part with it and part with the Charleston firm, and as the jury found that it was all with the plaintiffs, we can not say there was no evidence to support the finding. Moreover, the question of parties is not properly raised in the record. The first and second paragraphs of the defendants' answer set up that the unmerchantable rice was purchased from the plaintiffs. Each presented a claim by way of set-off for

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damages. It is conceded that the plaintiffs who composed the New York firm were also members of the firm doing business in Charleston.

The replication simply denied the averments contained in the answer, without taking objection or presenting any question as to a defect of parties. In this state of the record the question of a defect of parties must be deemed waived. *Cleveland v. Vajen*, 76 Ind. 146; *Thomas v. Wood*, 61 Ind. 132; *Akerly v. Vilas*, 21 Wis. 377, *ibid.* 88. The same rule is applicable to an answer which presents a set-off or other claim which might constitute an independent cause of action that applies to a complaint. If a defect of parties is apparent on its face, objection may be taken by demurrer. If not so apparent, it must be taken by plea.

It is next contended that the evidence fails to show that the salesman had authority to make the guaranty which the defendants claimed was made.

The inference to be drawn from the argument of counsel is, that it was incumbent on the defendants to prove affirmatively, either that express authority to that end had been conferred, or that such sales are usually attended with warranties. It may be said that the position contended for has the support of authority, but the authorities supporting it are, in the main, cases which involved an agency to do a single act, as the sale of some article by an agent in whose hands the particular article was placed for sale. *Andrews v. Kneeland*, 6 Cow. 354; *Smith v. Tracy*, 36 N. Y. 79; *Cooley v. Perrine*, 41 N. J. L. 322; *Brady v. Todd*, 9 C. B. (N. S.) 592.

We think the rule generally prevailing is, that an agent upon whom general authority to sell is conferred will be presumed to have authority to warrant, unless the contrary appears. Authority to sell generally, without any restrictions, carries with it *prima facie* authority to do any act or make any declaration in regard to the subject-matter of the sale necessary to consummate the contract and usually incident thereto, and until the contrary is made to appear, it will be

 Phillips v. Thorne.

presumed that a warranty is not an unusual incident to a sale by an agent for a dealer in a commodity or article, where the thing sold is not present and subject to the inspection of the purchaser. *Ahern v. Goodspeed*, 72 N. Y. 108; *Sturgis v. N. J. Steamboat Co.*, 62 N. Y. 625; *Nelson v. Cowing*, 6 Hill, 336; *Schuchardt v. Allens*, 1 Wall. 359; *Boothby v. Scales*, 27 Wis. 626; *Howard v. Sheward*, L. R., 2 C. P. 148; *Deming v. Chase*, 48 Vt. 382.

In all such cases, even though the authority of the agent is restricted by instructions from his principal, he will be bound by a warranty attending a sale made by the agent, unless the purchaser knew of the restriction. *Murray v. Brooks*, 41 Iowa, 45.

It may be proper to state that no question is made as to whether or not the statement made by the salesman, to the effect that the rice would keep all summer, if kept in a cool place, constituted a warranty or not. This is tacitly assumed on both sides. We decide nothing upon that point.

Judgment affirmed, with costs.

Filed Oct. 13, 1885.

No. 11,949.

PHILLIPS v. THORNE.

SUPREME COURT.—*Weight of Evidence.*—The Supreme Court will not disturb a verdict on the weight or preponderance of the evidence.

EVIDENCE.—*Harmless Error.—Practice.*—The subsequent offer by the trial court to admit excluded evidence, made while the parties and their witnesses were present in court and before argument, which offer was declined, will make the error, if any, in the exclusion of such evidence, a harmless one.

INSTRUCTIONS TO JURY.—*Discretion of Court.—Practice.*—At the close of the evidence, and before argument, the granting of time to prepare special instructions to the jury is a matter in the sound discretion of the trial court, and unless the record affirmatively shows an abuse of such discretion, the Supreme Court will not review the ruling of the trial court.

From the Delaware Circuit Court.

Phillips v. Thorne.

R. S. Gregory, A. C. Silverburg, J. Brown and W. A. Brown,
for appellant.

J. M. Brown and R. Warner, for appellee.

Howk, J.—In this case the appellee, Thorne, sued the appellant, Phillips, to recover damages for false imprisonment. The cause was put at issue and tried by a jury, and a verdict was returned for the appellee, assessing his damages at one hundred dollars. The court rendered judgment on the verdict.

The only error assigned by the appellant is the overruling of his motion for a new trial.

Appellant's counsel first insist that the verdict was not sustained by sufficient evidence and was contrary to law. The facts upon which appellee based his suit occurred in Henry county, where this action was commenced. There was evidence before the court and jury which tended to prove that in the summer of 1879 the appellee was required by a justice of the peace of Henry county to find bail, in the sum of \$100, for his appearance at the next term of the Henry Circuit Court, and that, having failed so to do, he was "turned over to a man named Adams," who resided in Rush county, Indiana, by the justice, to be taken to the county jail for confinement therein; that on the next day, Sunday, the man named Adams took the appellee, with the *mittimus* issued by the justice, and delivered them to the appellant, at or near the town of Lewisville, in Henry county, nine or ten miles from New-castle, the county seat; and that thereupon the appellant, without any pretence or color of legal authority, and against the will of the appellee, locked him up in what is called the "calaboose" of the town of Lewisville, and imprisoned him there through Sunday night and until Monday morning. These were the material facts which the appellee's evidence tended to establish.

Of course, as to some of these facts there was conflicting evidence introduced; but the questions in the case were questions of fact, and for the jury, and they had the right to be-

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lieve the evidence of the appellee in preference to that of the appellant. Their verdict has met the approval of the able and learned judge who presided at the trial, and, in such a case, as we have often decided, we will not disturb the verdict upon the evidence unless, as to some material point in the case, there is an absolute failure of evidence. This court will not weigh the evidence nor attempt to determine its preponderance.

Appellant's counsel also complain of the action of the court in excluding certain evidence, offered in his behalf, from the consideration of the jury. Even if this action of the court were erroneous, a point we need not decide, the record shows that the court afterwards, and before the commencement of the argument, reconsidered its previous action, and, while all the parties and their witnesses were present in the courtroom, said to the appellant and his counsel in open court that they might then go on and give the evidence and testimony previously excluded; and that the appellant, in person and by his counsel, then and there declined so to do. In this state of the record, the appellant can not be heard in this court to complain of such action of the trial court in the exclusion of such testimony and evidence as erroneous. The error of the court, if such it were, was made harmless to the appellant by the subsequent action of the court.

It is shown by the bill of exceptions "that at the close of the evidence, and before the commencement of the argument," the appellant, by his attorneys, requested the court to give such attorneys time to prepare special instructions to be given by the court in the cause, which request the court refused to grant, and the appellant at the time excepted. It is earnestly insisted by appellant's counsel that this action or ruling of the trial court was erroneous. In the *fourth* clause of section 533, R. S. 1881, it is provided as follows: "*Fourth.* When the evidence is concluded, and either party desires special instructions to be given to the jury, such instructions shall be reduced to writing, numbered and signed by the party or his

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attorney asking the same, and delivered to the court." Section 534, R. S. 1881, contains substantially the same provisions, and some additional ones not necessary to be noticed here, in relation to special instructions. We have found no statutory provision, however, which requires the trial court, upon the conclusion of the evidence, and before the commencement of the argument to the jury, to grant time to either party to reduce his special instructions to writing and deliver them to the court. We think, therefore, that we must leave this question precisely where the statute leaves it, namely, in the sound discretion of the trial court in each particular case, and that, unless the record affirmatively shows an abuse of such discretion, "by which the party was prevented from having a fair trial," this court will not, and ought not to, review the ruling of the lower court on that question.

In the case in hand, the record not only fails to show that the trial court abused its discretion in refusing to give appellant's attorneys time to prepare special instructions to be given in the cause, but the action or ruling of the court in refusing to give such time is abundantly justified, if justification were necessary, by the statements of the court in the bill of exceptions and by other facts elsewhere appearing in the record. It is hardly necessary for us to set out in this opinion these statements and facts; it will suffice to say that they show very clearly, as it seems to us, that the appellant and his attorneys had no reasonable excuse for their failure to have their special instructions prepared, and no reasonable ground for requesting the court to give them time to prepare such instructions.

We have found no error in the record of this cause which authorizes or requires the reversal of the judgment.

The judgment is affirmed, with costs.

Filed Oct. 16, 1885.

Thomson et al. v. The Madison Building and Aid Association.

No. 11,999.

THOMSON ET AL. v. THE MADISON BUILDING AND AID
ASSOCIATION.

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| 108 | 279 |
| 126 | 53 |
| 103 | 279 |
| 108 | 615 |

PROMISSORY NOTE.—Title.—Pleading.—In a complaint against the maker of a promissory note, it is sufficient to show title in the plaintiff, and this may be done by alleging that it was sold and assigned to him.

SAME.—Assignment of Note Carries Mortgage.—Where the note secured by a mortgage is assigned, the assignment carries the mortgage.

SAME.—Assignment in Blank.—Evidence of Title.—The assignment of a promissory note in blank is sufficient to prove title in the holder.

SAME.—Ultra Vires.—Defence.—If a corporation had no power to purchase a note and mortgage upon which it brings suit, that fact should be pleaded as a defence.

MORTGAGE.—Description.—The office of a description is to furnish means of identification, and a mortgage which does this is in that respect sufficient.

PLEADING.—Uncertainty.—Practice.—The remedy for uncertainty in a pleading is by motion, and not by demurrer.

SUPREME COURT.—Joint Assignment of Error.—A joint assignment of error must be good as to all or it is not good as to any.

SAME.—Objections to Evidence.—Practice.—Objections to evidence which are not stated in the bill of exceptions can not be considered on appeal.

SAME.—Motion for New Trial.—A party can not by statements in a motion for a new trial get evidence or objections thereto into the record.

From the Jefferson Circuit Court.

E. G. Leland and *S. E. Leland*, for appellants.

W. T. Friedley, *C. A. Korbly* and *W. O. Ford*, for appellee.

ELLIOTT, J.—The first paragraph of the appellee's complaint declares upon a note and mortgage executed by the appellants to John C. Smith.

It is contended that this paragraph of the complaint is bad because it does not aver that the note and mortgage were assigned to the appellee. This position is not tenable.

Where the complaint is against the maker of a note, it is sufficient to show title in the plaintiff, and this may be done by alleging that it was sold and assigned to him. The appellants confuse this case with an action founded upon an

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endorsement brought against an endorser; whereas the two cases are essentially different. The complaint before us shows title in the appellee. Where the note secured by a mortgage is assigned the assignment carries the mortgage. The complaint does show that copies of the note and mortgage are filed as exhibits.

If the appellee had no power to purchase the note and mortgage sued on, that fact should have been pleaded as a defence. It may have been necessary to purchase the mortgage in order to remove a lien and thus protect a mortgage taken by the association. The courts can not presume that the corporation did an illegal thing.

The office of a description is not to identify the property conveyed, but to furnish means of identification, and the mortgage sued on does this. It is, therefore, not void because of an insufficient description.

The second paragraph of the complaint is badly drawn, for its averment of the default in the performance of the conditions of the mortgage is uncertain, but the remedy for uncertainty is by motion and not by demurrer.

The appellants join in their assignment of error, and unless the assignment is good as to both it is not good at all. This is the long settled rule of this court. *Hinkle v. Shelley*, 100 Ind. 88, and authorities cited; *Boyd v. Anderson*, 102 Ind. 217. Under this assignment the appellant Christina Thomson can not avail herself of a ruling upon a demurrer to her separate answer, nor can she avail herself of a ruling upon a separate motion for a new trial.

The bill of exceptions shows that the written assignment on the back of the note described in the first paragraph of the complaint was read in evidence. Although this assignment was in blank it proved title in the appellee.

We are unable to find in the record the objections to the evidence which it is here claimed was erroneously admitted. It is well settled that unless objections to evidence are stated in the bill of exceptions, they can not be considered on ap-

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peal. A party can not by statements made in his motion for a new trial get evidence or objections stated to evidence into the record. The only way in which this can be done is by a bill of exceptions. *City of Delphi v. Lowery*, 74 Ind. 520 (39 Am. R. 98).

We have considered all of the questions presented by the joint assignment of errors, and this is all we can do under the law.

Judgment affirmed.

Filed Oct. 15, 1885.

 No. 11,741.

FUNK V. DAVIS ET AL.

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| 108 | 281 |
| 140 | 402 |
| 142 | 152 |
| 108 | 281 |
| 161 | 554 |

REVIEW OF JUDGMENT.—*Amended Supersedes Original Complaint.*—It is not necessary, in a complaint to review the proceedings and judgment in an action, to set out the original where an amended complaint was filed therein.

SAME.—Record.—Practice.—No more of the record of the case to be reviewed is required to accompany the complaint or bill for review than is necessary to present the question upon which error is predicated.

SAME.—Demurrer.—A complaint properly assigning one good cause for review will not be bad because others are not well assigned.

SAME.—Will.—Mistake in Description of Land Devised.—Evidence.—An alleged mistake in the description of land devised can not be corrected by the admission of extrinsic evidence, unless the language of the will itself furnishes the basis of the correction; and where, in violation of this rule, a judgment is rendered so correcting a description in a will, a complaint to review will lie.

SAME.—Demurrer.—Where a complaint to review a judgment does not show on its face that it was not filed within a year from its rendition, such defect can not be reached by demurrer.

PRACTICE.—Minors.—The fact that a complaint fails to aver that some of the plaintiffs are minors, suing by their next friend, will not make it bad on demurrer.

SAME.—Caption of Complaint.—Naming plaintiffs in the caption of a complaint as minors suing by next friend is not a sufficient averment of minority.

From the White Circuit Court.

Funk v. Davis *et al.*

M. M. Sill, T. F. Palmer and J. H. Wallace, for appellant.
W. E. Uhl, for appellees.

MITCHELL, C. J.—So far as necessary to be stated, the facts disclosed in this record are as follows: By the second clause of the will of Isaac Davis, there was devised to William Dayton Funk the “northwest quarter of the northwest quarter of section twenty-seven (27), the north half of the southwest quarter of the northwest quarter of said section, and the south half of the northeast quarter of the southwest quarter of section twenty-two (22), all in township twenty-eight (28) north, of range three (3) west.” The will bears date the 29th day of August, 1876. The testator died in 1878.

On the 20th day of August, 1879, William D. Funk commenced a proceeding in the White Circuit Court to correct an alleged mistake in the description of the land devised to him by the foregoing clause in the will.

It was averred in the complaint that, at the time the will was made, the testator was not the owner of the land described, lying in the *northwest* quarter of section twenty-seven, but that, instead, the land owned and intended to be described and devised to him, was the same description lying in the *northeast* quarter of the section mentioned; that by mistake the testator gave to the draftsman who prepared his will the words *northwest* when he meant *northeast*. The prayer of the complaint was that the mistake might be corrected, etc.

The record shows that, on the 6th day of November, 1879, an amended complaint was filed, setting up substantially the same facts, but making new parties, against whom process of the court was prayed. Some of the defendants disclaimed any interest in the controversy; others demurred to the complaint for want of sufficient facts, and still others, whose minority was suggested, answered in denial by a guardian *ad litem*. The demurrer to the complaint was overruled, to which ruling an exception was taken. Upon issues made the

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cause was submitted to the court, and on the 30th day of January, 1880, a finding was made and decree entered, correcting the alleged mistake, quieting the title and appointing a commissioner to convey as prayed in the complaint.

After the decree was entered, a motion for a new trial was made, overruled and excepted to, and this was followed by a motion in arrest, which was also overruled and excepted to.

On the 2d day of January, 1882, a complaint to review the foregoing proceedings and judgment, for error of law appearing therein, was filed in the same court. Some of the complainants are described in the caption of this complaint as adults, and others as minors, the minors suing by their next friend. All the pleadings and proceedings in the original case are set out except the original, which was superseded by an amended complaint.

The errors assigned in the complaint for review are, that the complaint did not state facts sufficient to constitute a cause of action; that a new trial ought to have been granted; that the motion in arrest of judgment should have been sustained, and that the court erred in overruling the same.

A demurrer was overruled to this complaint, and such further proceedings had thereon as that upon issues made the court found in favor of the infant plaintiffs and against those who were described as adults, and accordingly judgment was entered, over a motion for a new trial, reviewing and setting aside the original judgment as to the infants, and further adjudging that the adult plaintiffs take nothing by their proceeding.

Subsequently, a demurrer was sustained to the complaint in the original case, and, the plaintiff failing to plead further, it was adjudged that he take nothing by his action.

The first point of contention by counsel for the appellant is, that the complaint for review was not sufficient, because it did not set out with the transcript of the original proceedings a copy of the first complaint filed. The record shows that an amended complaint was filed. This superseded, as an

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amended pleading always does, the original, and it was, therefore, not necessary to set it out.

No more of the record of the case to be reviewed is required to accompany the complaint or bill for review than is necessary to present the question upon which error is predicated. *Stevens v. City of Logansport*, 76 Ind. 498.

We agree with counsel that a complaint for review which only questions one of several paragraphs of the complaint upon which the judgment sought to be reviewed rests, is not sufficient. But as the judgment here rests wholly on the amended complaint, the point is not well made.

It is argued further that the complaint is bad, because the written motion for a new trial, showing the causes assigned for a new trial of the original cause, does not appear in the proceedings set out in the bill for review. It is also said that the record shows that the motion in arrest of judgment in that case was not filed until after the judgment was rendered.

We think the points thus made are well taken so far as respects the errors assigned which are predicated upon these motions. But it does not follow that the demurrer to the bill for review should have been sustained, if the assignment as a cause for review that the original complaint did not state facts sufficient was well made.

This assignment brings under review the sufficiency of the complaint upon which the proceedings and judgment sought to be reviewed are founded. The sufficiency of that complaint depends upon whether the alleged mistake in the description of the land can be corrected by the admission of extrinsic evidence, for the purpose of showing that the land described in the will was not that intended.

The case is not within the ruling in *Cleveland v. Spilman*, 25 Ind. 95, as contended. In that case the testator devised his real estate to his wife by the following description: "My land, being the south half of the northeast quarter," etc. The land owned by the testator was in the *northwest*, instead of the *northeast* quarter, as written; and it was held that it was com-

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petent to show what land was intended. In that case language contained in the will itself furnished the basis for the correction. The words "my land," as was said in *Judy v. Gilbert*, 77 Ind. 96 (40 Am. R. 289), "were of themselves sufficient to carry the land then owned by the testator. The attempt to specifically describe the land did not make nugatory the general description."

In the case before us, however, there is nothing in the will upon which to predicate a construction that the land intended was different from that described. If the land intended had been identified in such manner as that some language contained in the will, affording a general description of it, would be found inconsistent with the specific description, then extrinsic evidence would be admissible to harmonize the two, or, as has been said, "evidence is admissible which in its nature and effect merely explained what the testator has written; but no evidence can be admissible which, in its nature or effect, is applicable to the purpose of showing merely what he intended to have written." The case falls directly within, and is controlled by, the well supported opinion in *Judy v. Gilbert*, *supra*. See, also, *Sherwood v. Sherwood*, 45 Wis. 357 (30 Am. R. 757).

It is claimed that the complaint for review was not filed within one year from the date of the rendition of the judgment, and that because it was not averred in the body of it that the plaintiffs were minors, and under disability, the demurrer to it should have been sustained.

It was stated in the caption that some of the plaintiffs, who were named, were adults, and others were there described as minors, suing by their next friend. This was not a sufficient averment of minority. The complaint was, however, not for that reason bad on demurrer. *Lancaster v. Gould*, 46 Ind. 397; *Mazedon v. State, ex rel.*, 24 Ind. 370.

Assuming, as from the body of the complaint we must, that all of the plaintiffs were adults, and that the complaint was not in fact filed within one year from the rendition of the

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judgment, as the statute requires, yet this defect was not, and could not be reached by the demurrer.

A demurrer reaches only such defects as are apparent on the face of the pleading. *Trentman v. Fletcher*, 100 Ind. 105, and cases cited. The face of the pleading would not indicate when the action was commenced, and for that reason the question whether the action had been commenced within one year from the rendition of the judgment could not be raised or determined by the demurrer to the complaint.

There was an answer in two paragraphs, in both of which this fact was averred, but one paragraph of the answer was denied, the other admitted by the reply, and thus no issue of law was raised on the answer.

The evidence is not in the record, and this question is not presented by a motion in arrest or otherwise. We must, therefore, presume that the action of the court was right, and accordingly the judgment is affirmed, with costs.

Filed Oct. 16, 1885

No. 12,363.

THE ELKHART MUTUAL AID, BENEVOLENT AND RELIEF ASSOCIATION v. HOUGHTON.

LIFE INSURANCE.—*Mutual Aid Association.—Action on Certificate of Membership.—Complaint.—Matter of Defence.*—In an action upon a certificate of membership issued by a mutual insurance company holding no reserve fund, entitling the beneficiary to "one thousand dollars, or so much thereof as may be realized from one assessment," it is not necessary to aver in the complaint the number of the members of the association against whom assessments might be made, and unless it be shown in defence that one assessment would not produce the full amount of the certificate, the plaintiff is entitled to recover the maximum insured.

SAME.—Insurable Interest.—Grandfather and Grandson.—Instruction.—An instruction, that "a grandson, with whom a grandfather resides, has an insurable interest in the life of the grandfather, and a policy of insurance taken out by the grandfather in favor of the grandson, in the absence of fraud, is valid and binding on the company issuing it," considered as a whole, is not an erroneous statement of law.

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| 127 | 284 |
| 103 | 280 |
| 134 | 8 |
| 103 | 286 |
| 141 | 423 |
| 141 | 429 |
| 143 | 367 |
| 103 | 286 |
| 159 | 646 |
| 159 | 647 |
| 159 | 648 |

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INSTRUCTIONS TO JURY.—*Absence of Evidence from Record.—Presumption.*—

Where the evidence is not in the record, the judgment will not be reversed on account of an instruction if the latter would be correct upon any state of the evidence which might have been properly before the jury, as in such case it will be presumed that the instruction was applicable.

From the Starke Circuit Court.

J. M. Vanfleet and *G. W. Beeman*, for appellant.

J. S. Bender, *A. I. Gould* and *B. D. Crawford*, for appellee.

ZOLLARS, J.—Appellee's right to recover rests upon two certificates of membership issued by appellant. These certificates are, in legal effect, policies of insurance upon the life of James Mitchell. So far as concerns any question involved in this case, the rules of law which govern ordinary policies of insurance are applicable here. Appellee declared upon these certificates and made them a part of his complaint. In each of them, appellee is named as the payee and beneficiary. The portions of each of the certificates, necessary to be set out here, are as follows: "This certifies that James Mitchell has paid ten dollars, the amount required on application, and has covenanted and agrees to pay \$1.50, as an assessment upon the death of any member, or the maturity of any certificate. He is, therefore, and hereby, constituted a member, and entitled to participate in the benefits of the Elkhart Mutual Aid, Benevolent and Relief Association. * * * This certificate entitles James E. Houghton, his heirs or assigns, within ninety days after presentation of satisfactory proof of the death of said member, to one thousand dollars, or so much thereof as may be realized from one assessment, not exceeding one thousand dollars, payable at the home office of said association in the city of Elkhart. * * * 7. This association will hold no reserve fund, and all losses will be paid from moneys derived from mutual assessments."

The complaint avers the death of James Mitchell, the proof of his death, and the refusal of appellant to pay the amounts named in the certificates or any part thereof, and its

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refusal to order or make any assessment upon the members of the association to raise the required sum or any part of it. The complaint is not assailed upon the ground that it shows the invalidity, or fails to show the validity, of the certificates as policies of insurance upon the life of James Mitchell, in favor of appellee as beneficiary.

The sole objection urged to the complaint is, that it does not state the number of the members of the association against whom assessments might be made to raise the money with which to pay in full or in part the amounts named in the certificates. The contention is, that the complaint does not make a case, without the averment that there are such members, and a statement of the number of them. Appellant has not only refused to pay the amounts named in the certificates, but has also refused to make any assessment. So the complaint alleges. Under these averments, admitted to be true by the demurrer, appellee is entitled to a money judgment against appellant. The certificates each provide that, upon the death of the assured, appellee is entitled to \$1,000, or so much as may be realized from one assessment, etc. The undertaking in each certificate is for \$1,000, unless an assessment will not produce that much. That an assessment would not produce \$2,000, we think is a matter of defence to be set up by appellant. It would be difficult, if not impossible, for appellee to know how many members of the association there are. The books of the association doubtless show the number. These books are in the possession and custody of the officers of the association. If the members are such, in number, that an assessment would not produce \$2,000, that fact is known to the officers of the association, and they should set it up in an answer, and make good the answer by proof, as they readily could if true.

This, we think, is the reasonable rule to apply in a case like this, and especially where, as here, the insurer contests the claim upon other grounds, and utterly refuses either to pay or make an assessment.

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We are aware that there are authorities against as well as in support of the rule we here adopt. The case of *Lueders' Ex'r v. Hartford Life and Annuity Ins. Co.*, 4 McCrary, 149, supports our view to the full extent, and we content ourselves with a citation of that case, and one case by this court. Lueders, in his lifetime, held five certificates of insurance similar to those in suit, which provided that in case of the death of the holder, an assessment should be made upon all other certificate holders, to pay the amounts named in the certificates, and that not to exceed one thousand dollars, the amount named in each certificate, should be paid upon such certificate. It was contended in that case that the executor of Lueders should aver and prove the number of outstanding certificates. In answer to this contention MCCRARY, J., among other things, said: "It is best known to the company who and where are the certificate holders, and, if plaintiff's rights to a judgment on a disputed loss are to be limited by the number, etc., of outstanding certificates, it would seem that defendant should set up the limit as to the number, etc., lapsed or otherwise. * * * Despite some decisions to the contrary, this court can not hold otherwise than that when suit has to be brought the recovery should be for the maximum insured, unless the defendant shows by pleadings and proof that said sum should be reduced." See, also, *Excelsior Mut. Aid Ass'n of Anderson v. Riddle*, 91 Ind. 84.

Our holding that the complaint makes a case for a recovery of the full amount of the certificates until something is pleaded and proven to reduce that amount, disposes of appellant's contention that the judgment for \$2,000 is too large. It is not beyond the complaint, and we can not say that it is too large upon the evidence, because the evidence is not before us.

The only other alleged error argued by counsel is the giving of the fifth instruction by the court below. It is as follows:

"Much has been said about an insurable interest in the life
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of another. Upon this question, and as a matter of law, I instruct you that a grandson, with whom a grandfather resides, has an insurable interest in the life of the grandfather; and a policy of insurance taken out by the grandfather in favor of the grandson, in the absence of fraud, is valid and binding on the company issuing it."

It is well settled that a single instruction must be considered as a whole, and is not to be dissected and overthrown, because an isolated part, when thus wrenched from its proper connection, may seem to be erroneous. *McDermott v. State*, 89 Ind. 187.

It is well settled, also, that where the evidence is not in the record, the judgment will not be reversed on account of an instruction, if, upon any state of the evidence which might properly have been before the jury, the instruction would have been correct. In such a case, it will be presumed that the instruction was applicable to the evidence. *Keating v. State, ex rel.*, 44 Ind. 449; *North Western Mut. Life Ins. Co. v. Heimann*, 93 Ind. 24; *Dennerline v. Gable*, 73 Ind. 210; *Stratton v. Kennard*, 74 Ind. 302; *Drinkout v. Eagle Machine Works*, 90 Ind. 423; *Wade v. Guppinger*, 60 Ind. 376; *Higbee v. Moore*, 66 Ind. 263; *Powers v. State*, 87 Ind. 144.

The fair interpretation of the instruction complained of, taken as a whole, and the one a jury would be most likely to put upon it, is, we think, that if a grandfather procures an insurance upon his life in favor of a grandson with whom he lives, the grandson will have such an insurable interest in the life of the grandfather as that the policy will not be invalid in the absence of fraud, and, as applied to this case, that the grandson may maintain an action upon the policy. Thus interpreted, the instruction clearly does not enunciate an erroneous proposition of law, and in the state of the record it must be presumed that it was applicable to the evidence.

The evidence may have been that the grandfather, James Mitchell, procured the policies of insurance, paid the premiums, and, in good faith and for cause, had them made pay-

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able to the grandson, appellee, as the beneficiary. And so, the grandfather may have been indebted to appellee.

In the case of *Provident Life Ins. and Investment Co. v. Baum*, 29 Ind. 236, one brother insured his life in favor of another. In one paragraph of the complaint, it was averred that the brother was made the beneficiary, in consideration of love and affection. No interest of a pecuniary nature was shown. The court also charged the jury that it was wholly immaterial under the evidence in the case, whether the beneficiary had or had not any interest of a pecuniary nature in the life of the assured. This court, in holding the instruction to be correct and the complaint good, said: "The position assumed by the appellant, in argument, that this policy is one of indemnity, and that the appellee must show an interest in the life of the assured, does not, we think, arise in this case. The policy in terms declares that the company insures Americus Baum against loss of life in the sum of three thousand dollars. It can not be questioned that a person has an insurable interest in his own life, and that he may effect such insurance, and appoint any one to receive the money in case of his death during the existence of such policy. It is not for the insurance company, after executing such a contract, and agreeing to the appointment so made, to question the right of such appointee to maintain the action. If there should be any controversy as to the distribution among the heirs of the deceased, of the sum so contracted to be paid, it does not concern the insurers. The appellant contracted with the insured to pay the money to the appellee, and upon such payment being made, it will be discharged from all responsibility. So far as the insurance company is interested, the contract is effective as an appointment of the appellee to receive the sum insured." The learned counsel for appellant think that this case is, in principle, overthrown by the case of *Franklin Life Ins. Co. v. Hazzard*, 41 Ind. 116 (13 Am. R. 313). We do not think so. In that case, Hazzard, for a nominal consideration, had the

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policy upon the life of one Cone assigned to him, and took the assignment as a mere matter of speculation. Upon this ground, the assignment was condemned as being opposed to public policy. The learned judge who wrote the opinion in that case also wrote the opinion in the later case of *Franklin Life Ins. Co. v. Sefton*, 53 Ind. 380, in which the case of *Provident Life Ins. and Investment Co. v. Baum*, *supra*, was quoted from and approved. It was further said: "Doubtless, also, a person may take a policy upon his own life, and, by the terms of the policy, appoint a person to receive the money in case of his death during the existence of the policy." The case of *Provident Life Ins. and Investment Co. v. Baum*, *supra*, was again approved in the late case of *Continental Life Ins. Co. v. Volger*, 89 Ind. 572 (46 Am. R. 185), and distinguished from a case where a person, for his own benefit, procures a policy upon the life of another and pays the premiums. And it was held, that in such a case, the payee and beneficiary must aver in his complaint his insurable interest in the life of the assured, and that such averments need not be made by the beneficiary in a case where a person has procured a policy upon his own life, and appointed another, and had him named in the policy as the beneficiary.

In support of this distinction, the case of *Guardian Mut. Life Ins. Co. v. Hogan*, 80 Ill. 35 (22 Am. R. 180), is cited. Mr. Bliss, in his work on Life Insurance, at section 26, says: "A person has undoubtedly an insurable interest in his own life, and that interest supports a policy, whether he makes the loss payable to himself, his executors, or his assigns, or to a nominee or appointee named in the policy. Nor is a policy obtained by one on his own life for the benefit of another, which latter advances the premium, necessarily void. The question is whether the policy was in fact intended to be what it purports to be, or whether the form was adopted as a cover for a mere wager. If the plaintiff and the insured confederated together to procure a policy for the plaintiff's benefit, when he is not and does not expect to be a creditor

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of the insured, and with a view of having the policy assigned to him without consideration, the policy is void."

In the case of *Campbell v. New England Mut. Life Ins. Co.*, 98 Mass. 381, Campbell obtained a policy of insurance upon his life for the use of a brother's wife. Want of interest in the beneficiary was the ground of defence. Upon this point the court said: "The policy in this case is upon the life of Andrew Campbell. It was made upon his application; it issued to him as 'the assured;' the premium was paid by him; and he thereby became a member of the defendant corporation. It is the interest of Andrew Campbell in his own life that supports the policy. The plaintiff did not, by virtue of the clause declaring the policy to be for her benefit, become the assured. * * * It was not necessary therefore that the plaintiff should show that she had an interest in the life of Andrew Campbell, by which the policy could be supported as a policy to herself as the assured." This case is approved in *Stevens v. Warren*, 101 Mass. 564, where it is further observed that if it should appear that the arrangement was a cover for a speculating risk, contravening the general policy of the law, it would not be sustained. The same doctrine is announced in the case of *Olmsted v. Keyes*, 85 N. Y. 593, after a review of the authorities. See, also, *Fairchild v. North-Eastern Mut. Life Ass'n*, 51 Vt. 613; *Clark v. Allen*, 11 R. I. 439 (23 Am. R. 496); *Loomis v. Eagle L. & H. Ins. Co.*, 6 Gray, 396; *Lemon v. Phœnix, etc., Ins. Co.*, 38 Conn. 294.

In the case of *Connecticut Mut. Life Ins. Co. v. Schaefer*, 94 U. S. 457, it was said: "A man can not take out insurance on the life of a total stranger, nor on that of one who is not so connected with him as to make the continuance of the life a matter of some real interest to him. It is well settled that a man has an insurable interest in his own life, and in that of his wife and children; a woman in the life of her husband, and the creditor in the life of his debtor. Indeed, it may be said generally that any reasonable expectation of pecuniary benefit or advantage from the continued life of another creates

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an insurable interest in such life. And there is no doubt that a man may effect an insurance on his own life for the benefit of a relative or friend."

Again, in the case of *Ætna Life Ins. Co. v. France*, 94 U. S. 561, where a policy was upon the life of a person expressly for the benefit of his sister, the same court said: "We concur in the construction of the policy made by the court" (below), "and in the validity of the transaction. As held by us in the case of the *Connecticut Mut. Life Ins. Co. v. Schaefer*, *supra*, p. 457, any person has a right to procure an insurance on his own life and to assign it to another, provided it be not done by way of cover for a wager policy; and where the relationship between the parties, as in this case, is such as to constitute a good and valid consideration in law for any gift or grant, the transaction is entirely free from any such imputation. The direction of payment in the policy itself is equivalent to such an assignment."

These authorities are abundantly sufficient to show that the instruction under examination in this case, as applicable to the evidence as it might, and may have been under the issues, is not erroneous.

Judgment affirmed, with costs.

Filed Oct. 17, 1885.

No. 11,689.

THE WESTERN UNION TELEGRAPH COMPANY v. McDANIEL.

TELEGRAPH COMPANY.—Statutory Remedy.—Construction.—A statute giving a remedy is to be construed as giving it to one entitled to recover under the general rules of law, unless it is otherwise expressed in the statute itself.

SAME.—Contributory Negligence Bars Recovery of Statutory Penalty.—Contributory negligence in the sender of a message will bar a recovery of the statutory penalty for a breach of duty.

SAME.—Facts Constituting Contributory Negligence.—Where the sender of a

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message directs it "To Mrs. La Fountain, Kankakee," a city of twelve or fifteen thousand inhabitants, and fails, upon having his attention called to the fact by the agent of the telegraph company, to make the name more definite, or to give the street and number of her residence, he is guilty of contributory negligence.

SAME.—*Province of Supreme Court.*—Upon an indisputable state of facts, it is the province of the Supreme Court to pass upon the question of the defendant's negligence.

From the Benton Circuit Court.

J. R. Coffroth, T. A. Stuart, J. A. Stein and D. Fraser, for appellant.

J. T. Brown and G. H. Stewart, for appellee.

ELLIOTT, J.—The questions in this case arise on the evidence, and it is unnecessary to say anything more of the pleadings than that the complaint seeks a recovery of the statutory penalty directed against telegraph companies guilty of a breach of duty.

The message which the appellee left with appellant's agent at Fowler, in this State, was addressed thus: "To Mrs. La Fountain, Kankakee." The sender of the message testified that "The despatch was intended for Louis La Fountain, but was sent to Mrs. La Fountain for him." The operator at Fowler was called as a witness by the appellee, and in the course of his testimony said: "I wrote the despatch as Mr. McDaniel told me; I asked for the given name of Mrs. La Fountain and her street number; he said he did not know it, and it was not necessary to give her name or street number as she was well known." The messenger boy at Kankakee testified that he delivered the message to Mrs. Nancy La Fountain at her home, and that she was the only Mrs. La Fountain that he knew.

The appellee introduced Mrs. Gertin who swore that she had formerly been known as Mrs. La Fountain, but that she had not been known by that name for twelve years, and that it was at her house that the message was left. On her cross-examination, however, she said: "There was a woman in my

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house at Kankakee by the name of Mrs. La Fountain, her husband, Mr. La Fountain, was my son." The messenger boy was recalled, and, in the course of his testimony, said: "I left the message with the only Mrs. La Fountain I knew, in that old lady's (Mrs. Gertin's) house."

The plaintiff also introduced evidence tending to show that some time after the delivery of the message, the boy asked Mrs. Gertin to sign the receipt for the message, and that at the time this request was made she refused to accede to it, but she did subsequently authorize her son to sign the name of Mrs. La Fountain to the receipt. Kankakee was shown to be a city of from twelve to fifteen thousand inhabitants.

The ground upon which the statute authorizes a recovery in a case like this is negligence, and it devolves upon the plaintiff to establish a negligent omission of duty. It is true that he makes out a *prima facie* case of negligence when he proves that a message, properly addressed, was not delivered, and it is also true that all he need do is to state a *prima facie* case in his complaint, and establish it by the evidence. *Julian v. Western Union Tel. Co.*, 98 Ind. 327.

The rule that the telegraph company must explain the failure to deliver the message is founded upon the same general principle on which rests the rule that a carrier of passengers must explain the cause of an injury to a passenger when an injury is shown. *Western Union Tel. Co. v. Scircio*, ante, p. 227.

The fact that the carrier of passengers must explain the cause of the injury does not, however, prevent the application of the doctrine of contributory negligence. The doctrine of our cases, and they are in line with the great weight of authority, is, that where negligence is the basis of the action, the plaintiff must prove that his own negligence did not proximately contribute to the injury for which he sues. Negligence is the basis of such an action as this, and it is difficult to perceive why the doctrine of contributory negligence

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should not apply in all its vigor; but, at all events, it is clear that where the evidence affirmatively shows contributory negligence, the action will fail. There is authority for the proposition that contributory negligence will bar an action for damages resulting from a negligent breach of duty. Scott & J. Law of Telegraphs, sec. 413. This is in harmony with the general principles affirmed by a long and straight line of decisions, and it is consistent with ancient and familiar principles of elementary law. The law encourages diligence and rebukes negligence. It requires of men the exercise of prudence and care. Equity, liberal as are its principles, denies relief in cases of accident and mistake to those who fail to exercise ordinary care and prudence, and it denies relief to a suitor who is not diligent in instituting his suit. More than this, equity refuses its aid to relieve against fraud, if the suitor has omitted to exercise the prudence and care of a reasonable man. All the analogies of the law support the rule that the negligent man can not recover for an injury caused by the negligence of another. If there is any case where the doctrine of contributory negligence should apply, it is to an action to recover a statutory penalty, where the foundation of the right of recovery is the negligence of the defendant. In such a case, the plaintiff suffers no actual loss, and sustains no real injury. If the negligent breach of duty causes him loss or does him harm, his remedy is for a breach of contract, not an action to enforce a penalty. The man who seeks to enforce a statutory penalty demands the enforcement of a steel-cold, legal right, and he, of all suitors, should be free from negligence. The foundation of his action is the negligence of the person whom he sues, and he sues, not because he has suffered loss, but because the statute gives him a right to enforce a penalty for his own benefit. Demanding, as he does, that his adversary be punished for negligence, his demand comes with bad grace when he is himself guilty of the same species of wrong for which he seeks to recover.

The statute did not intend to reward the negligent. To

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permit a man to recover whose own fault proximately contributed to bring about the failure of duty of which he complains would put a premium on carelessness, for the more careless the sender of a message, the greater the probability of a failure to transmit his message correctly. There would be less likelihood of a message carefully addressed going astray, than of one carelessly addressed, and, therefore, the more careless the sender the greater the chance of his obtaining a reward in the shape of the statutory penalty, unless his own negligence could be used against him. If contributory negligence can not be made available, then the statute might be made the instrument of great injustice, for unscrupulous men, seeking to recover the penalty, would so address their messages as to make it easy to deliver them to the wrong person, or not to deliver them at all. The statute was not intended for the benefit of either negligent or bad men.

Statutes form part of one great and uniform system of law. *Humphries v. Davis*, 100 Ind. 274 (50 Am. R. 788). A statute giving a remedy is to be construed as giving it to one entitled to recover under the general rules of law, unless it is otherwise expressed in the statute itself. This has been held time and again of statutes giving a right to recover where death is caused by negligence. In these cases, and it may almost be said, "their name is legion," it has been uniformly held that contributory negligence is a complete bar to a recovery, yet the statute gives a right of action in general terms. Illustrations might be multiplied, but the proposition is so clear in itself that we deem it unnecessary. We conclude that contributory negligence in the sender of a message will bar a recovery of the statutory penalty. If we ruled otherwise, we should declare that negligence in one party was rewarded by punishing his adversary, and such a holding would violate all principle and ignore all precedent.

The appellee was guilty of negligence. His attention was called to the fact that the name of the person to whom the message was addressed should be given, and that the street

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and number should be stated. He failed to give either and rested upon the supposition that she was well known. This was not such prudence and care as the law requires. If a man addresses a message to Mrs. Jones, or Mrs. Smith, in a city of twelve or fifteen thousand inhabitants, he exercises a degree of care much below the legal standard. It may possibly be, that if the telegraph company had accepted the message without calling the sender's attention to the insufficiency of the address, it could not be held that there was contributory negligence, but, here, the sender of the message had his attention directed to the insufficiency of the address, and, instead of endeavoring to remedy the defect, elected to incur the hazard of its safe transmission. He was in fault, he assumed the risk, and he can not make another suffer for the consequences of his own negligence. Slight care on his part would have provided the means of identifying the person to whom the message was sent, and having, after due warning, failed to exercise this care, he is in no situation to demand a penalty. Penalties are not given as a matter of favor, and one who claims a penalty must bring himself fully and clearly within the law.

We do not decide this cause upon the weight of evidence. We put our decision upon the ground laid down by the Supreme Court of Pennsylvania in a case not unlike the present. It was said by that court: "The cases are numerous that upon an undisputed state of facts it is the province of the court to pass upon the question of defendant's negligence." *Koons v. Western Union Tel. Co.*, 102 Pa. St. 164. The rule stated in the case cited is the rule of this court. *Pittsburgh, etc., R. R. Co. v. Spencer*, 98 Ind. 186. These cases, it is true, speak of the negligence of the defendant, but negligence is negligence whether on the part of the plaintiff or of the defendant, and the rule as to how it is to be determined and by whom, is the same in the one case as in the other.

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We do not deem it necessary to decide the other questions discussed, as there must be a new trial, and these questions may not again arise.

Judgment reversed.

Filed Oct. 13, 1885.

No. 11,921.

PERRY v. MAKEMSON.

SPECIAL FINDING.--*General Verdict.*—Special findings of facts by the jury not irreconcilably inconsistent with their general verdict will not overcome the latter.

SUPREME COURT.--*Weight of Evidence.*—The Supreme Court will not disturb the general verdict of the jury upon the weight of the evidence.

SAME.--*Instructions.*—*Harmless Error.*—Error in any one or more instructions given by the trial court is not sufficient ground for the reversal of a judgment which is right on the evidence.

From the Kosciusko Circuit Court.

C. Clemans, for appellant.

HOWK, J.—This was a suit by the appellant, Perry, to recover the possession of certain real estate in Kosciusko county, which he alleged that the appellee had held under a tenancy from him, which tenancy had then expired, and that appellee unlawfully held over and detained the possession of such real estate from him. The issues in the cause were tried by a jury, and a general verdict was returned for the appellee, the defendant below. With their general verdict the jury also returned into court their special findings on particular questions of fact, submitted to them by the appellant, under the direction of the court. Over the appellant's motion for judgment in his favor on the special findings of the jury notwithstanding their general verdict, and his motion for a new trial, the court rendered judgment on the general verdict.

Several errors are assigned by the appellant in this court,

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but the record of this cause is in such an imperfect and unfinished condition that it is at least doubtful whether any of the errors complained of are properly presented for our decision. But the appellee is not here objecting to the many defects in the transcript, nor has he filed any brief or argument in support of the rulings below, of which appellant complains.

Appellant's counsel first insists very earnestly that the trial court erred in overruling his motion for judgment, in his favor, on the special findings of the jury notwithstanding their general verdict. Conceding, without deciding, that the appellant's interrogatories and the answers of the jury thereto are properly in the record, we will consider and decide the question of their sufficiency to control the general verdict. Appellant propounded twelve interrogatories, to which the jury returned answers with their general verdict. It would be unprofitable we think, for us to set out these interrogatories and the answers of the jury thereto in this opinion. It will suffice for us to say that there is not one of the facts, found specially by the jury, which is inconsistent with their general verdict, or which can not be readily reconciled therewith. Section 547, R. S. 1881, provides that "When the special finding of facts is inconsistent with the general verdict, the former shall control the latter, and the court shall give judgment accordingly." Under this section of the code, this court has uniformly held that unless the special findings of the jury are irreconcilably inconsistent with the general verdict, the latter must stand and judgment be rendered thereon without regard to such special findings. *Detroit, etc., R. R. Co. v. Barton*, 61 Ind. 293; *Baldwin v. Shuter*, 82 Ind. 560; *Grand Rapids, etc., R. R. Co. v. McAnnally*, 98 Ind. 412.

In the case in hand, we are of opinion that the trial court did not err in overruling the appellant's motion for judgment in his favor on the special findings of the jury notwithstanding their general verdict.

Appellant's counsel also insists that the court erred in overruling his motion for a new trial. We can not disturb the

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general verdict of the jury upon the evidence. Indeed, from our examination of the evidence, it seems to us that the merits of this cause were fairly tried and determined below, and that the general verdict for appellee was clearly right. The instructions of the court correctly gave the law of the case to the jury; but, if there were error in any one or more of the instructions, we could not under our decisions, with our view of the case, reverse the judgment below on that ground. This point has often been decided. *Norris v. Casel*, 90 Ind. 143; *Daniels v. McGinnis*, 97 Ind. 549, and cases cited.

We have found no error in the record of this cause which authorizes or requires the reversal of the judgment.

The judgment is affirmed, with costs.

Filed Oct. 13, 1885.

No. 12,132.

THE BOARD OF COMMISSIONERS OF BROWN COUNTY v. THE
STANDARD OIL COMPANY.

TAXATION.—*Personal Property.*—*When Deemed in Transitu.*—Where property is collected from one or more points, by any means of transportation, and is awaiting the necessary preparation and facilities for further transportation, it will be deemed to be in transit while so detained, and not liable to taxation.

SAME.—*Property Intended for Transportation.*—*Situs.*—But where property is collected, even though it may be at the point of final shipment, to await indefinitely the owner's pleasure or the rise of markets, or to undergo a partial process of manufacture, or from any other cause having no relation to the preparation for or facilities or exigencies of transportation, it will be held to have acquired a *situs*, making it subject to taxation.

From the Bartholomew Circuit Court.

R. L. Coffey and *N. R. Keyes*, for appellant.

G. W. Cooper, for appellee.

MITCHELL, C. J.—The Standard Oil Company, incorporated

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under the laws of the State of Ohio, and having its principal office and place of business in the city of Cleveland in that State, filed a claim in the commissioners' court of Brown county, for the refunding of taxes alleged to have been wrongfully exacted from and paid by it on certain property owned by it, which was found in that county.

It appeared that in March, 1881, the company entered into a contract with one McGregor, under which he was to furnish and deliver to it, at Cleveland, Ohio, and Indianapolis, Indiana, for a stipulated price, 3,000,000 staves, which, under a modification of the original contract, were to become the property of the company upon being *piled* in the yards, in which they were found when listed for taxation by the assessor. The contract required, that before being finally delivered to the company, the staves were to undergo a certain process known as "bucking." By this it was meant that the rough staves were to be passed through a machine called a "bucker," which cut them of uniform length and thickness. The purpose of this was two-fold, to reduce them in size, so as to save freightage, and to prepare them for more convenient use in the manufacture of barrels. It was also stipulated that all staves were to be allowed to stand in piles for a period of three months before being shipped, unless sooner called for by the company, and the whole quantity was to be delivered by April 1st, 1882. After being piled up awaiting the process above described, the staves were listed for taxation by the township assessor.

It did not appear whether the property had been listed for taxation in the State of Ohio or not, nor do we now inquire whether that would have made any difference.

The company contended that, under the facts shown, the property was not subject to taxation in this State, and having paid the taxes to prevent the sale of its property, it was decided below that the appellee was entitled to have the amount refunded.

Section 6271, R. S. 1881, provides that "All real property

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within this State, all personal property owned by persons residing in this State, * * * and all personal property within this State owned by persons not residing within this State, subject to the exceptions hereinafter stated, shall be subject to taxation."

The property upon which the taxes were assessed and collected is not within any statutory exception. By construction, it is held that personal property owned by non-residents, which is found in transit, in or through the State, or which is temporarily awaiting facilities for transportation, is not subject to taxation here. Accordingly, it was held in the case of *Standard Oil Co. v. Bachelor*, 89 Ind. 1, where it appeared that the company had purchased a quantity of staves for exportation beyond the State, and had procured them to be hauled from the several points where they had been purchased, to the railroad station, ready for shipment as soon as railroad transportation could be secured, that such property was to be considered as substantially *in transitu*, and not liable to taxation. With that ruling we are entirely satisfied, but this case does not fall within it.

^ In the case under consideration, the property, after being collected into yards, was to be subjected to a preparatory or partial process of manufacture. It was to remain in piles at least three months, unless sooner required, and it might remain for a much longer period. There could be no propriety in saying, either that the property was in transit, or that it was temporarily awaiting an opportunity for transportation. It can not be doubted, that where property is collected from one or more points, by any means of transportation, and is awaiting the necessary preparation and facilities for further transportation, it will be deemed to be in transit while so detained for further exportation; but when property is collected, even though it may be at the point of final shipment, to await indefinitely the owner's pleasure or the rise of the markets, or to undergo a partial process of manufacture, or from any other cause having no relation to the preparation for or

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facilities or exigencies of transportation, such property will acquire an actual *situs*, rendering it subject to taxation.

The case is controlled in all its essential features by *Standard Oil Co. v. Combs*, 96 Ind. 179 (49 Am. R. 156); and for the error of the court in overruling the motion for a new trial, the judgment is reversed, with costs.

Filed Oct. 17, 1885.

No. 11,504.

CAPPER v. THE LOUISVILLE, EVANSVILLE AND ST. LOUIS
RAILWAY COMPANY.

RAILROAD.—*Master and Servant.—Delegation of Master's Duties to Agent.—Negligence.—Liability of Master.*—Where a master delegates duties which the law imposes upon him to an agent, the latter, whatever his rank, in performing such duties acts as the master, and for an injury to an employee caused by the negligence of such agent, the master is liable.

SAME.—*Foreman.—Fellow Servants.*—A foreman, or other like agent, except where the master's duties are delegated to him, is a fellow servant with those under his immediate supervision, and for his negligence the master is not liable to a servant engaged in the same general service.

SAME.—*Tunnel Repairer and Trainmen Fellow Servants.*—One engaged in the work of constructing and repairing tunnels upon the line of a railroad, who is injured while being carried from one point to another upon the line of the road, is a fellow servant with the engineer and other persons in charge of the train.

From the Floyd Circuit Court.

C. L. Jewett, for appellant.

A. Dowling, for appellee.

ELLIOTT, J.—The material allegations of the appellant's complaint are these: "Prior to the 7th day of February, 1883, the plaintiff, being a laborer, entered into the service of the defendant to work and assist at removing loose and projecting pieces of stone from the sides and roof of a tunnel, and to place in the tunnel timbers and frames for bracing and

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supporting the sides and roof thereof, in the doing of all of which the plaintiff acted under the command and direction of one James O'Hara, who was the person appointed by the defendant as the general superintendent of the said work and the laborers engaged therein. On the 7th day of February, 1883, while engaged about his work at the said tunnel, he, with other laborers, was directed and ordered by James O'Hara, under a threat of discharge if he disobeyed, to get upon a freight train of the defendant's and go to another tunnel near Georgetown to work. The freight train was not stopped to allow the plaintiff to embark thereon, but was running slowly, so that plaintiff might safely have gone upon the steps and into the car, but for the negligence and carelessness of the defendant's servants who were in charge of the said train. James O'Hara directed the plaintiff to get upon said train while it was moving slowly as aforesaid, and the plaintiff, in obedience to said order, and using due care to prevent accident or injury, attempted so to do, and for that purpose took hold of the iron rod, or hand-rail, at the rear end of the car into which he was directed to go, and started to get upon the steps of said car, but the plaintiff says that at that instant the engineer and servants of the defendant in charge of the engine which was moving said car along the track, without warning the plaintiff of their intention so to do, violently forced said car forward with great violence, causing the same to violently jerk the plaintiff, by the force and violence of which his hold was loosened from the iron rod, and he was thrown under the car and his foot run over and crushed."

The appellee contends that the trial court rightly decided that the complaint was bad, for the reason that it appears that the injury to the plaintiff was caused by the negligence of a fellow servant. The appellant, on the other hand, contends that the ruling of the trial court was wrong, because the servants of the appellee, whose negligence caused the injury, were not in the same general line of employment.

The allegations of the complaint do not bring the case

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within the cases holding that where a servant is transferred by command of his superior to a line of service different from that which he undertook when he entered the service of the master, he may maintain an action against the master for injuries received while engaged in the work to which he was transferred. Such decisions as those in *Lalor v. Chicago, etc., R. R. Co.*, 52 Ill. 401 (4 Am. R. 616), *Union Pacific R. R. Co. v. Fort*, 17 Wall. 553, *Chicago, etc., R. W. Co. v. Bayfield*, 37 Mich. 205, *Hurst v. Chicago, etc., R. R. Co.*, 49 Iowa, 76, and *Mann v. Oriental Print Works*, 11 R. I. 152, do not, in any event, rule this case, and we need not, and we do not, enter upon any examination of the doctrine which they maintain. The complaint before us does not aver that the appellant engaged in the service of the company to do a particular work, or pursue a designated line of service, from which he was wrongfully transferred. It does not appear that the command of the superintendent was not one which the duties of the appellant's employment required him to obey. For anything that appears, the command to go from one tunnel to another was one which the superintendent had a right to give, and to which the engagement of the appellant required him to yield obedience. It is true that the complaint avers that the command of the superintendent was given under a threat of discharge, but this is by no means equivalent to averring that the command took the appellant out of the general line of his employment, or that it was one to which he was not bound to submit under his engagement in the service of the company. It can not be presumed that either the master or the superior agent violated a duty, and disregarded the rights of the appellant. A plaintiff who founds a cause of action upon a breach of duty must state such facts as show the duty and its violation.

It may now be taken as settled in this State, that where a master delegates duties which the law imposes upon him to an agent, the agent, whatever his rank, in performing those duties, acts as the master. *Indiana Car Co. v. Parker*, 100

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Ind. 181, and authorities cited; *Atlas Engine Works v. Randall*, 100 Ind. 293 (50 Am. R. 798).

The case relied on by the appellant, *Ohio, etc., R. W. Co. v. Collarn*, 73 Ind. 261 (38 Am. R. 134), rests on this principle. In that case the railroad company was held liable on the ground that the master mechanic, whose negligent breach of duty caused the injury, was not a fellow servant, but, in the discharge of the duties cast upon him, was acting for the master, and stood in his place. The complaint under examination does not state facts showing that the superintendent O'Hara acted in the master's place; on the contrary, it states such facts, and only such facts, as show that the so-called superintendent was nothing more than the foreman in charge of the particular work in which the appellant was employed.

In the case of *Indiana Car Co. v. Parker*, *supra*, a great number of cases were collected, from which it appears that the rule has been long and firmly established, that for the negligence of a foreman, or other like agent, the master is not liable to a servant engaged in the same general service. It is not necessary to again review the cases or investigate the subject, for the rule is too well established to be now shaken, that a foreman, except where the master's duties are delegated to him, is a fellow servant with those under his immediate supervision, and that for the negligence of a fellow servant an action will not lie against the common master.

This case is that of a servant engaged in the work of constructing and repairing tunnels upon the line of the railroad, and receiving an injury while being carried from one point to another upon the line of his employer's road. The decisions of our court are that one who is employed to do work upon the track of a railroad is a co-servant with the engineer and others in charge of the train that carries him to and from his work. *Ohio, etc., R. R. Co. v. Tindall*, 13 Ind. 366; *Wilson v. Madison, etc., R. R. Co.*, 18 Ind. 226; *Slattery v. Toledo, etc., R. W. Co.*, 23 Ind. 81; *Thayer v. St. Louis, etc.,*

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R. R. Co., 22 Ind. 26; *Ohio, etc., R. R. Co. v. Hammersley*, 28 Ind. 371; *Gormley v. Ohio, etc., R. W. Co.*, 72 Ind. 31.

It is not possible to distinguish in principle between the cases we have cited and the present, for it can not make any difference whether the servant was employed to repair tunnels, relay rails, replace ties or spread gravel in ballasting the track, and this case must fall within the rule declared in those cases. The authorities are very numerous in support of the doctrine maintained by our decisions, and among the cases upon this subject are: *O'Brien v. Boston, etc., R. R. Co.*, 19 Reporter, 462; *Gillshannon v. Stony Brook R. R. Co.*, 10 Cush. 228; *Russell v. Hudson River R. R. Co.*, 17 N. Y. 134; *Holden v. Fitchburg R. R. Co.*, 129 Mass. 268 (37 Am. R. 343); *Manville v. Cleveland, etc., R. R. Co.*, 11 Ohio St. 417; *Keystone Bridge Co. v. Newberry*, 96 Pa. St. 246; S. C., 42 Am. R. 543; *Vick v. New York, etc., R. R. Co.*, 95 N. Y. 267; S. C., 47 Am. R. 36; *Thompson v. Chicago, etc., R. W. Co.*, 18 Fed. R. 239; *Pennsylvania R. R. Co. v. Wachter*, 60 Md. 395; *Dallas v. Gulf, etc., R. W. Co.*, 61 Texas, 196; *Troughear v. Lower Vein Coal Co.*, 62 Iowa, 576; *Brown v. Minneapolis, etc., R. W. Co.*, 31 Minn. 553; *Heine v. Chicago, etc., R. W. Co.*, 58 Wis. 525; *Chicago, etc., R. R. Co. v. Moranda*, 93 Ill. 302; S. C., 34 Am. R. 168; *Cunningham v. International R. R. Co.*, 51 Texas, 503; S. C., 32 Am. R. 632.

The doctrine is now so well settled, and has so long prevailed, that we can not depart from it, although if it were an open question some of us would be inclined to a different view.

Our conclusion is that the complaint is bad, because it shows that the negligence which caused the plaintiff's injuries was that of a fellow servant.

Judgment affirmed.

Filed Oct. 17, 1885.

The Indiana, Bloomington and Western Railway Company v. McBroom.

No. 12,034.

THE INDIANA, BLOOMINGTON AND WESTERN RAILWAY
COMPANY v. MCBROOM.

108 310
128 256

103 310
151 433
103 310
161 452

NEW TRIAL.—*Application for, as of Right.—Pending Appeal.*—The fact that an appeal has been taken, and is pending undisposed of in the Supreme Court, will not, in an action for the recovery of real estate, prevent the appealing party from taking a new trial as a matter of right, as provided by section 1064, R. S. 1881.

SAME.—*Supreme Court.—Dismissal of Appeal.*—Where the judgment has been vacated by the granting of a new trial as a matter of right, upon certification of such action to the Supreme Court, the appeal will be stricken from the docket.

SAME.—*Statute Granting New Trial as of Right Mandatory.*—When the application for a new trial as of right is made within one year as provided by statute, the trial court has no discretion—it must vacate the judgment and grant such new trial.

ELLIOTT, J., dissents.

From the Warren Circuit Court.

C. W. Fairbanks, L. Nebeker and H. H. Dochterman, for appellant.

J. McCabe, L. P. Miller and C. M. McCabe, for appellee.

HOWK, J.—The record of this cause shows that, on the 29th day of June, 1883, appellant's motion for a new trial for cause having been overruled, the court rendered judgment in appellee's favor for the recovery of certain real estate, and the costs of suit, from which judgment the appellant prosecuted an appeal in this court. After such judgment was affirmed here, on June 12th, 1884, but before such appeal was finally disposed of here, on November 12th, 1884, by the overruling of appellant's petition for a rehearing, the record further shows that, on the 28th day of June, 1883, the appellant presented to the trial court its application in writing for a new trial as matter of right, under the provisions of section 1064, R. S. 1881, and, on the same day, filed in open court its written undertaking, with sureties approved by such court, that it would pay all costs and damages which should be recovered against it in this action. The

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record further shows that thereupon, on the day last named, the court below ordered and adjudged that its former judgment in this action, rendered on June 29th, 1883, in favor of appellee and against the appellant, and its finding upon which such judgment was predicated, should be vacated, set aside and held for naught, and that a new trial of this action should be granted the appellant, on its written application as aforesaid.

Afterwards, on the 27th day of October, 1884, the parties appeared in the court below, and the appellee moved the court in writing to set aside its order and judgment, of the 28th day of June, 1884, vacating its previous judgment and granting the appellant a new trial of this cause, as matter of right, under the statute, upon the ground and for the reason that, by reason of the pendency of the aforesaid appeal from such previous judgment in this cause, in the Supreme Court as aforesaid, the circuit court had no jurisdiction, power or authority to vacate and set aside the judgment so appealed from, and grant such new trial as of right, as was done in this cause, or to hear or entertain appellant's application therefor. The circuit court sustained the appellee's motion, and set aside its order and judgment of June 28th, 1884, vacating its previous judgment of June 29th, 1883, and granting appellant a new trial of this cause, as a matter of right.

The appellant excepted to the decision of the circuit court upon appellee's motion, and has appealed therefrom, and, by proper assignments of error here, has presented the question of the correctness of that decision for the consideration of this court.

In section 1064, R. S. 1881, under which the appellant's application for a new trial of this cause, as a matter of right, was addressed to the circuit court, it is provided as follows: "The court rendering the judgment, on application made within one year thereafter by the party against whom judgment is rendered, his heirs, assigns, or representatives, and on the applicant giving an undertaking, with surety to be approved by the court or clerk, that he will pay all costs and

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damages which shall be recovered against him in the action, shall vacate the judgment and grant a new trial. The court shall grant but one new trial under the provisions of this section."

In this case, the appellant made its application for a new trial as of right, to the proper court, within the time given, and, in all respects, complied strictly and literally with the terms and requirements of the statute. But it is claimed that by reason of the appeal to this court, and of the pendency of such appeal, the circuit court is deprived of all jurisdiction to grant an application for a new trial, when the statute imperatively requires that it shall grant such new trial. In the case provided for therein, the section of the statute quoted confers jurisdiction of an application for a new trial as of right, upon the court rendering the judgment; and the fact, if it be the fact, that such judgment has been appealed from, does not render such court any the less the court which rendered the judgment, nor deprive it of its express statutory jurisdiction. When the application is made to the proper court, within the time limited by the statute for such new trial as of right, the court has no discretion; it must vacate the judgment and grant such new trial. When the judgment is thus vacated, if it has been appealed from, it will be vacated and set aside as well in the appellate court as in the court rendering the judgment, and if the action of the latter court, in vacating the judgment, is certified to the appellate court, the appeal will be stricken from its docket without further action thereon.

This is not a case in which it can be correctly said that the party has his election between two remedies, and that, if he choose and pursue one, he can not afterwards claim the benefit of the other. In such cases as the one at bar, the statute quoted gives the losing party an additional right or remedy, peculiar to the case. He may, if he choose so to do, first exhaust all the methods, common to other civil actions, for the purpose of obtaining a new trial, and then, if he fail, he

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may as a last resort make his application for a new trial as of right, under the section of the statute above quoted. This is a right he does not waive or estop himself from asserting by his previous efforts to obtain a new trial for cause, whether in the court rendering the judgment or in the appellate court. If he make his application for a new trial as of right, to the court rendering the judgment, and give the undertaking with approved surety, as required by the statute, within one year after the rendition of the judgment, the court has no discretion in the case, but must vacate the judgment and grant the new trial. This is what the court correctly did, in the case in hand, on the 28th day of June, 1884.

For the reasons given we are of opinion that the court erred in sustaining appellee's motion to set aside its order and judgment vacating its previous judgment and granting the appellant a new trial of this cause as of right, under the statute.

The judgment is reversed, with costs, and the cause is remanded, with instructions to overrule appellee's motion, etc., and for further proceedings not inconsistent with this opinion.

Filed Oct. 17, 1885.

DISSENTING OPINION.

ELLIOTT, J.—I can not concur in the prevailing opinion for two reasons:

First. The appeal took the case from the jurisdiction of the circuit court, and that court could not, while the case was in the Supreme Court, grant a new trial either as of right or for cause.

Second. The appellant had an election between inconsistent remedies, and having elected that of appeal he can not go into the trial court and secure a new trial.

Filed Oct. 17, 1885.

The City of North Vernon v. Voegler.

No. 11,840.

THE CITY OF NORTH VERNON v. VOEGLER.

MUNICIPAL CORPORATION.—*Street Improvement.—Error in Plan.—Negligence.*

—A municipal corporation is not liable for mere errors of judgment as to the plan of a public improvement, but is responsible for negligence in devising the plan of an improvement, as well as for negligence in executing the work. *Rozell v. City of Anderson*, 91 Ind. 591, explained.

SAME.—*Consequential Damages.*—Municipal corporations are not responsible for consequential injuries resulting from the grading of streets, where the work is done in a careful and skilful manner.

SAME.—*Permanent Improvement.—Damages to Real Estate.—Action.*—In an action for injury to real estate caused by the negligence of corporate officers in constructing a public work of a permanent character, as the grading of a street, all damages, past and prospective, can be recovered in one action.

SAME.—*Former Adjudication.*—In such a case, all the damages must be recovered in one suit, and for fresh damages resulting from the original wrong, a second action can not be maintained.

SAME.—*Answer.—Reply.—Demurrer.*—Where an answer avers that the injury complained of is the same as that declared on in the former action, and the record does not show them to be different, the averment will be taken as true on demurrer; if the causes of action are not the same, that fact must be replied.

SAME.—*Nuisance.*—The improvement of a street by a municipal corporation is not a nuisance, though done in a negligent and unskilful manner; and hence the rule that the continuance of a nuisance will supply ground for successive actions, has no application.

CAUSE OF ACTION.—*Injury.—Damages.*—In every valid cause of action two elements must be present, the injury and the damages; one is the legal wrong to be redressed, and the other is the scale or measure of the recovery.

SAME.—Fresh damages without a fresh injury will not authorize a second or subsequent action.

PLEADING.—*Construction of.*—Pleadings are to be judged by their general scope and tenor, and not by detached and isolated statements thrown into them.

From the Jennings Circuit Court.

J. G. Berkshire, G. F. Lawrence and J. L. Yates, for appellant.

ELLIOTT, J.—There are two paragraphs in the appellee's complaint, both alleging that the appellant so negligently and

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| 108 | 314 |
| 135 | 418 |
| 135 | 479 |
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| 131 | 144 |
| 103 | 314 |
| 136 | 373 |
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| 149 | 683 |
| 103 | 314 |
| 157 | 417 |
| 103 | 314 |
| 158 | 241 |
| 103 | 314 |
| 166 | 21 |

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unskillfully graded one of its public streets as to change the flow of surface water, gather it in one channel and pour it upon the lots of the appellee, greatly injuring her property. The first paragraph of the complaint differs from the second in one particular, and that is in alleging that a former action was commenced by the appellee which resulted in a judgment in her favor. The allegations upon this subject are these: "That in September, 1879, the plaintiff brought suit against the defendant for the damages then accrued to her by reason of the overflowing and injury of her premises up to that time; that in March, 1880, she recovered judgment in that action for eighty dollars so accrued up to September, 1879; that all of said overflows of said premises have continued, as also the other said injuries to plaintiff's premises ever since September, 1879, when the former action was brought, but the defendant has done nothing and made no efforts to change or prevent said flow of water over the lot of plaintiff."

On these averments the appellant founds the objection to the complaint, that it shows on its face that the matter pleaded has been adjudicated, but as there are answers which more clearly present the question, we defer our consideration of it until we take up those answers. •

The second paragraph of the answer is in substance this: The improvement of the street was made under an ordinance and a plan of the common council, duly enacted and adopted; that the improvement of the street was, in the judgment of the common council, necessary and proper, and that the injuries complained of were the unavoidable result of the improvement of the street.

The sufficiency of this answer is sought to be maintained upon the decision in *Rozell v. City of Anderson*, 91 Ind. 591, but that decision is very far from sustaining such an answer as the one before us. In that case, the evidence was not in the record, as the opinion shows, and the court was simply called upon to determine whether the instruction assailed was correct upon any supposable state of the evidence admissible

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under the issues in the cause. We have no doubt that the ruling in that case was right upon the question as the record presented it. We hold now, as we held then, that, as an abstract rule of law, a municipal corporation is not liable for mere errors of judgment as to the plan of a public improvement; but we did not then hold, nor do we now hold, that for negligence, whether in the plan of the work or its execution, a municipal corporation is not liable. That we did not then hold that for negligence the municipal corporation is not liable, is evident from the fact that the court, in the opinion given in that case, cites with approval the cases which hold a municipal corporation liable for negligence in the plan of an improvement as well as in the manner of executing the work.

We have many cases, extending from *City of Indianapolis v. Huffer*, 30 Ind. 235, down to *City of Crawfordsville v. Bond*, 96 Ind. 236, holding that for negligence in devising a plan as well as for negligence in executing it, the municipal corporation is liable. This was in effect the decision in the case appealed to this court by the appellant, involving the sufficiency of just such an answer as that now before us. *City of North Vernon v. Voegler*, 89 Ind. 77. The question was fully considered and the authorities cited in the cases of *City of Evansville v. Decker*, 84 Ind. 325 (43 Am. R. 86), *Cummins v. City of Seymour*, 79 Ind. 491 (41 Am. R. 618), *Weis v. City of Madison*, 75 Ind. 241 (39 Am. R. 135), *City of Indianapolis v. Tate*, 39 Ind. 282, and *City of Indianapolis v. Lawyer*, 38 Ind. 348.

The doctrine is not only sustained by authority, but is sound in principle. Suppose that the common council of a city determine to build a sewer, and cover it with reeds, can it be possible that the corporation can escape liability on the ground that the common council erred in devising a plan? Or, to take such a case as *City of Indianapolis v. Huffer*, *supra*, suppose the common council undertake to conduct a large volume of water through a culvert capable of carrying less than one-

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tenth of the water conducted to it by the drains constructed by the city, can responsibility be evaded on the ground of an error of judgment? Again, to take an illustration from a somewhat different class of cases, suppose the common council to devise a plan for a bridge that will require timbers so slight as to give way beneath the tread of a child, can the city escape liability on the ground that there was only an error of judgment in devising the plan? Illustrations might be indefinitely multiplied, but it is unnecessary to pursue the subject. The only rule that has any solid support in principle is, that for errors in judgment in devising a plan there is no liability, but there is liability where the lack of care and skill in devising the plan is so great as to constitute negligence.

Our decisions have long and steadily maintained that municipal corporations are not responsible for consequential injuries resulting from the grading of streets, where the work is done in a careful and skilful manner, but they have quite as steadily maintained that where the work is done in a negligent and unskilful manner, the corporation is liable for injuries resulting to adjacent property. *City of Kokomo v. Mahan*, 100 Ind. 242, see page 246; *City of Crawfordsville v. Bond*, *supra*; *Town of Princeton v. Gieske*, 93 Ind. 102; *Weis v. City of Madison*, 75 Ind. 241; S. C., 39 Am. R. 135; *City of Evansville v. Decker*, *supra*, and authorities cited; *Macy v. City of Indianapolis*, 17 Ind. 267.

The complaint in this case very fully alleges the negligence and unskilfulness of the defendant, and an answer admitting these allegations can not avoid them by averring, as the one before us does, that the negligence and want of skill were not in doing the work, but in devising the plan. We have not considered the fugitive denials cast into the answer for the reason that it is now well settled that pleadings are to be judged by their general scope and tenor, and not by detached and isolated statements thrown into them. *Neidefer v. Chastain*, 71 Ind. 363 (36 Am. R. 198); *Western Union Tel. Co. v. Reed*, 96 Ind. 195, see p. 198.

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There are several paragraphs of answer pleading a former adjudication, and we perceive no substantial difference between them, but, as we are not aided by a brief from the appellee, and as the third paragraph presents the question in a clearer light than the others, we confine our investigation and decision to that paragraph. The material averments of this paragraph, exhibited in a condensed form, are these: On the 18th day of September, 1879, the appellee filed her complaint in the Jennings Circuit Court against the appellant, and in the action thus begun the appellee recovered judgment for \$80 at the March term, 1880. This judgment remains in full force. The complaint in that action stated as a cause of action the injuries to the same property from the same negligence and unskilful improvement of the same street, as that described and charged in the present action. The appellant has made no other improvement than the one described in the former complaint, and the injuries resulting to appellee's property were such only as were caused by the improvement made prior to the filing of the complaint in the action begun in September, 1879. The concluding averment of the answer is this: "And it is the grading of the same street and the building of the same culverts and the identical grading and building, and the identical negligence and want of care and skill now complained of that were complained of in the former action and not others."

The answer presents a question of great importance and much difficulty. The theory of the appellee, as we infer from the record, is, that the former action embraced only such damages to the real estate as occurred prior to the recovery of the judgment in that action. The theory of the appellant is, that the former action embraced all damages resulting to the appellee's property from the negligent improvement of the street, and that a second action can not be maintained for the same breach of duty that formed the basis of the first action.

There is a material distinction between damages and injury.

Injury is the wrongful act or tort which causes loss or harm to another. Damages are allowed as an indemnity to the person who suffers loss or harm from the injury. The word "injury" denotes the illegal act, the term "damages" means the sum recoverable as amends for the wrong. The words are sometimes used as synonymous terms, but they are, in strictness, words of widely different meaning. There is more than a mere verbal difference in their meaning, for they describe essentially different things. The law has always recognized a difference between the things described, for it is often declared that no action will lie because the act is *damnum absque injuria*. Broom Legal Max. 195; Weeks *Damnum Absque Injuria*, 7; Broom Com. (4th ed.) 75, 621.

In every valid cause of action two elements must be present—the injury and the damages. The one is the legal wrong which is to be redressed, the other the scale or measure of the recovery. Mayne Dam. 1; 1 Sutherland Dam. 3. As there may be damages without an injury, so there may be an injury without damages. It has many times been said that no action will lie because the injury produced no damages, or, as the law phrase runs, the wrong is *injuria sine damno*.

The distinction between injury and damages is an important one in this instance, and for this reason we have been careful to mark the difference and to enforce our statement by reference to authorities, although the principle involved is a rudimentary one. The distinction is important, for the reason that the law is, that fresh damages, without a fresh injury, will not authorize a second or subsequent action. The rule is thus tersely stated in *Warner v. Bacon*, 8 Gray, 397: "A fresh action can not be brought unless there be both a new unlawful act and fresh damage." This rule is illustrated by many cases. Mr. Mayne refers to the case of *Howell v. Young*, 5 B. & C. 259, and commenting on it says: "The statute of limitations runs from the act of negligence, not from the time that an injury accrues; such injury is merely consequential damage, not a fresh cause of action; the damages then in the

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original action must cover all the loss that can ever arise, because no such loss can afterwards be compensated." Mayne Dam. 611. An American author says: "A cause of action and the damages recoverable therefor are an entirety. The party injured must be plaintiff, by the common law, and he must demand all the damages which he has suffered or ever will suffer from the injury, grievance or cause of action, upon which his action is founded. He can not split a cause of action and bring successive suits for parts, because he may not be able at first to prove all the items of the demand, or because all the damages have not been suffered." 1 Sutherland Dam. 175.

The rule we are discussing applies to cases of personal injuries, for, among the earliest of the reported cases, we find it laid down for law that in an action for trespass to the person the recovery of damages must be once for all, including past as well as prospective damages. *Fetter v. Beale*, 1 Salk. 11; S. C., 1 Ld. Raymond, 339.

In *Hodsoll v. Stallebrass*, 11 Ad. & E. 301, it was held that both injury and damage must concur to give a cause of action; that the damages were not the sole cause of action, and the jury were directed to assess both present and prospective damages, because a second action could not be brought for damages resulting from the same injury. Upon this ancient doctrine rest the cases which hold that where personal injuries are received from the negligent act of a carrier of passengers, or are caused by the negligence of a municipal corporation, all the damages, present and prospective, must be assessed in one action, because a second action can not be brought. *Town of Elkhart v. Ritter*, 66 Ind. 136; *Weisenberg v. City of Appleton*, 26 Wis. 56; S. C., 7 Am. R. 39; *Whitney v. Clarendon*, 18 Vt. 252; S. C., 46 Am. Dec. 150; 1 Sutherland Dam. 197, auth. n. p. 198.

Mr. Mayne, in discussing this general subject, says: "Similar questions often arise in cases where a person by digging, mining, building, or the like, affects the plaintiff's land or

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house in such a manner as to produce injurious consequences, which manifest themselves at a later period. Here it is now settled that all subsequent or recurring damage may be assessed, and can only be recovered in a suit brought upon the original cause of action." Mayne Dam. 138. In *Backhouse v. Bonomi*, 9 H. L. Cases, 503, the doctrine declared by the author from whom we have quoted is asserted. There is, however, a later English case which seems to break in upon the rule of the earlier cases, and to shake in some degree, at least, their authority. It does, indeed, expressly overrule the case of *Lamb v. Walker*, L. R. 3 Q. B. Div. 389. The case to which we refer is *Mitchell v. Darley Main Colliery Co.*, 21 Cent. L. J. 148; S. C., 24 Am. L. Reg. 432. If that case can be regarded as well decided, it must be deemed an exception to the general rule, for the general rule is, that one action, and one only, can be maintained for a breach of duty constituting a tort. The English court seems to have gone still further in opposition to the ancient rule, in *Brunsdon v. Humphrey*, 24 Am. L. Reg. 369, but in that case Chief Justice Coleridge dissented, and an able reviewer says: "It certainly seems that the reasoning of COLERIDGE, C. J., in the principal case, is more in harmony with the established rules of law. And it should be noted that the opinion of POLLOCK, B., and LOPES, J., in the court below, 11 Q. B. 712, were on the same side, so that really the majority of those judges who have expressed opinions on the subject are against successive actions in such cases." *Ibid.* 378.

These English cases may, however, be discriminated from the one we are discussing, for, in this case, the improvement of the street was a permanent one; while, in the only one of these English cases that is analogous to the present, the act out of which the wrong arose was of a different character. The case before us is clearly analogous to the seizure of land under the right of eminent domain for railroad or highway purposes, and in all such cases it is held, both by the English

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and the American courts, that all the damages, present and prospective, must be assessed in one proceeding. *Lafayette, etc., Co. v. New Albany, etc., R. R. Co.*, 13 Ind. 90; *Montmorency, etc., Co. v. Stockton*, 43 Ind. 328; 1 Sutherland Dam. 191.

In the case of *Powers v. Council Bluffs*, 45 Iowa, 652, S. C., 24 Am. R. 792, the city cut a ditch along the side of the plaintiff's lot and caused his lands to be overflowed, and it was declared that the cause of action was complete when the unlawful act was committed, and that all of the damages accruing from the original wrong must be included in one action. It is true, that this case has been criticised, but the criticism does not affect its force upon the point to which we cite it. Wood Lim. of Actions 372. The criticism upon the case is, that the court erred in holding that the cause of action accrued when the ditch was dug, for the reason that no damages at all accrued until some time after the ditch was dug, and until the damages did accrue there was no complete cause of action. Conceding, but not deciding, that the criticism is just, it does not break the force of the decision as applied to this case, for, here, there were both damages and injury before the first action was commenced, and Mr. Wood concedes, or rather affirms, that if the element of damages had been present in the case cited, the decision would be right. In *Town of Troy v. Cheshire R. R. Co.*, 3 Foster N. H. 83, it was held that, "In case for nuisance, if the act done is necessarily injurious, and is of a permanent nature, the party injured may, at once, recover his damages for the whole injury." In that case the injury to the town was done by the construction of a railroad, and the court said: "The injury done to the town is then a permanent injury, at once done by the construction of the railroad, which is dependent upon no contingency, of which the law can take notice, and for the injury thus done to them, they are entitled to recover at once their reasonable damages."

It is true in the present case, as it was in the one referred

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to, that the improvement of the street was a permanent one, and as it was permanent the cause of action was complete when damages resulted, and the recovery must be, not for part of the damages, or for some damages, but for all the damages resulting from the wrong which constituted the cause of action. Turning to a somewhat different line of cases, we find running through them all the same general principles found in the cases we have cited. Thus, in actions against an attorney for negligence, the rule is that all the loss resulting from the wrong must be recovered in one action, and no subsequent action can be maintained. *Wilcox v. Plummer*, 4 Peters, 172; *Moore v. Juvenal*, 92 Pa. St. 484; *Campbell's Adm'r v. Boggs*, 48 Pa. St. 524; *Downy v. Garard*, 24 Pa. St. 52; *Miller v. Wilson*, 24 Pa. St. 114; *Owen v. Western Saving Fund*, 97 Pa. St. 47; S. C., 39 Am. R. 794; *Howell v. Young*, *supra*.

In *Owen v. Western Saving Fund*, *supra*, the last case cited was approved, and it was said of it: "And, in this case, it was held, that special damages, resulting from a breach of duty, do not constitute a fresh ground of action, but are merely the measure of the injury resulting from the original cause." The general principle we are discussing was involved in the case of *Richardson v. Eagle Machine Works*, 78 Ind. 422 (41 Am. R. 584), where it was held that an agent who elected to bring an action for wages could not bring a second action to recover damages for a breach of the contract, stipulating that the employment should continue for one year.

In *Crosby v. Jeroloman*, 37 Ind. 264, the court quoted with approval from the opinion in *Secor v. Sturgis*, 16 N. Y. 548, the following: "I admit that the rule does not extend to several and distinct trespasses or other wrongs, nor, as we have seen, to distinct contracts. It goes against several actions for the same wrong, and against several actions on the same contract."

The general rule, as stated by a recent author, is this: "When a wrongful act is done which produces an injury

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which is not only immediate, but from its nature must necessarily continue to produce loss independent of any subsequent wrongful act, then all the damages resulting, both before and after the commencement of the suit, may be estimated and recovered in one action." 3 Sutherland Dam. 403.

In *Adams v. Hastings, etc., R. R. Co.*, 18 Minn. 260, this rule was enforced. The court, speaking of the construction of a railroad, said: "And if such erection necessarily caused the surface water to stand upon plaintiff's land, or run into his cellar and well, he could recover therefor in this action, though such injury might not accrue for some time after the completion of such illegal act, viz.; the making of the road-bed and track." This general principle is also maintained in *Seely v. Alden*, 61 Pa. St. 302.

There are many cases declaring and enforcing the general rule that the plaintiff may recover in one action all the damages he suffers, whether retrospective or prospective, where the injury which causes the loss or harm is of a permanent character, as a street, a canal or a railroad. All things that proximately contribute to the injury may be taken into consideration in estimating the damages, and if the injury extends so far as to totally destroy the value of the property, then damages equal to the value of the property may be awarded. Mr. Freeman states the rule very strongly. His statement is this: "All the damages which can, by any possibility, result from a single tort, form an indivisible cause of action." He also says: "For damages alone, no action can be permitted. Hence, if a recovery has once been had for the unlawful act, no subsequent suit can be sustained." Freeman Judg., section 241. The cases of *Cadle v. Muscatine Western R. R. Co.*, 44 Iowa, 11, *Finley v. Hershey*, 41 Iowa, 389, *Illinois Central R. R. Co. v. Grabill*, 50 Ill. 241, *Elizabethtown, etc., R. R. Co. v. Combs*, 10 Bush, 382, *Jeffersonville, etc., R. R. Co. v. Esterle*, 13 Bush, 667, illustrate and enforce the principles we are discussing.

In *Fowle v. New Haven, etc., Co.*, 112 Mass. 334, S. C., 17

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Am. R. 106, language is used which so forcibly applies here that we quote it: "The case at bar," said the court, "is not to be treated strictly in this respect as an action for an abatable nuisance. More accurately it is an action against the defendant for the construction of a public work under its charter in such a manner as to cause unnecessary damage by want of reasonable care and skill in its construction. For such an injury the remedy is at common law. And if it results from a cause which is either permanent in its character, or which is treated as permanent by the parties, it is proper that entire damages should be assessed with reference to past and probable future injury."

As probable future damages may be taken into consideration in an action to recover for a loss caused by the negligence of corporate officers in constructing a public work of a permanent character, the plaintiff in such an action can recover all the damages he has sustained, and in such cases no second action can be maintained. To permit a second action to recover damages resulting from the negligent grading of a street, would be to allow successive damages to be awarded where there was no fresh wrong. Great injustice would almost inevitably result from a rule permitting successive actions, for it would be impossible to prevent damages from being twice assessed for the same wrong.

The ultimate conclusions to which these authorities lead are: *First.* That where there is one cause of action, all the damages must be recovered in one suit, and for fresh damages resulting from the original wrong a second action can not be maintained. *Second.* Where the cause of action is the negligence and unskilfulness of the officers of a municipal corporation in the improvement of a street, the injury is complete and permanent, constituting but one cause of action, and in a suit on that cause of action all damages, present and prospective, may be recovered, and for fresh damages resulting from the improvement a second action will not lie.

The complaint of the appellee, as we have seen, is based

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upon the negligence of the corporate officers in improving a street and the improvement is a permanent one, so that the tort which formed the basis of the action was complete when damages resulted. The answer avers, and the demurrer admits, that there was no new wrong or negligence. As the pleadings stand, there is a single wrong and nothing more. The fresh damages do not, as the pleadings aver, arise from a new or fresh wrong. The case, therefore, is not within the authorities which hold that where there is a new neglect or a fresh wrong, there may be a second action.

The answer avers that the injury complained of is the same as that declared on in the former action. It goes even further, for it affirmatively shows that no improvement has been made, and that no grading has been done since that described in the former complaint. The causes of action are, therefore, the same. Where the answer avers the causes of action to be the same, and the record does not show them to be different, the averment is taken to be true on demurrer. *Outler v. Cox*, 2 Blackf. 178.

If the causes of action are not the same, that fact must be replied. *James v. State*, 7 Blackf. 325. We have, upon the pleadings, therefore, a case where there are fresh damages, but where there is no fresh cause of action, for the utmost that can be yielded to the appellee is, that the record shows that damages have resulted since the first action, flowing, however, from the original wrong. We need not decide what might be successfully replied; we simply decide the question before us, and our decision is that the answer sufficiently pleads a former adjudication.

We have already placed stress upon the fact that the construction of the highway is permanent, and that the wrong was complete when the street, as a permanent work, was finished and damages resulted. We deem it proper to emphasize this element of the case, for we can readily conceive cases of an essentially different character where a very different rule would apply. We can conceive of cases where a tem-

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porary wrong might be done under such circumstances as would make it reasonable to presume that the defendant would right the wrong before a recurrence of harm or loss, and in such cases it might well be that the plaintiff could bring a second action. We know that there are cases where it is proper to presume that the wrong-doer will not maintain the unlawful thing that caused the harm or loss. *Mayne Dam.* 141, section 110. But the case upon which we are pronouncing judgment, and to which we confine our decision, is one where the improvement of the street was a completed and permanent fact, and where the parties must presume that it was permanent in its character, and that it was intended that the thing done should remain unchanged. It can not be presumed that municipal officers, having built a street or road, intended it to be temporary; a presumption that the wrong was not of a permanent character might, perhaps, obtain where a natural watercourse is temporarily obstructed, or where, in the course of improving a street, water was thrown upon a lot; but it can not prevail where the improvement of the street is complete and the street permanently constructed.

This is not the case of a nuisance. It is the case of a negligent improvement of a street. The improvement was in itself rightful and legal, but the manner in which the improvement was made was wrongful. The wrong was not in grading the street, but in the manner of doing it. It is not a nuisance for a municipal corporation to grade its streets, but it is an actionable wrong to do it negligently. The wrong in negligently grading the street is the basis of the action, for there are no facts alleged constituting a nuisance. It is not a nuisance to do what the law authorizes, but it may be a tort to do the authorized act in a negligent manner. It is evident, therefore, that the cases which hold that the continuance of a nuisance will supply grounds for successive actions have no influence upon this case.

Judgment reversed.

Filed Oct. 27, 1885.

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No. 11,273.

MAYHEW v. BURNS.

PARENT AND CHILD.—*When Father May Maintain Action in His Own Right for Death of Child.*—*Cases Modified and Approved.*—Under section 266, R. S. 1881, a father, during the continuance of the relation of parent and child, may maintain an action in his own right for damages caused by the death of his child. *Gann v. Worman*, 69 Ind. 458, modified, and *Pennsylvania Co. v. Lilly*, 73 Ind. 252, approved.

SAME.—*When Action Must be Brought by Personal Representative.*—Where the relation of parent and child does not exist, the action, under section 284, R. S. 1881, must be brought by the personal representative, regardless of the age of the person whose death has been caused.

MARRIED WOMAN.—*Liability for Tort.*—A married woman, for a tort committed by the violation of any duty imposed upon her by law with respect to her separate property, is liable to the same extent as if she were unmarried.

NEGLIGENCE.—*Excavation Causing Pitfall upon Adjoining Lot.*—*Parent and Child.*—One who makes an excavation upon his lot in such a manner as to cause a pitfall upon an adjoining lot is liable, in the absence of contributory negligence, to one who resides upon the latter, for the death of his child caused by falling into such pit.

SAME.—*Evidence.*—*Care of Children.*—*Pecuniary Condition of Father.*—*Contributory Negligence.*—Where one is suing for the death of his child alleged to have been caused by the negligence of another, evidence that the plaintiff is poor, and not able to employ any one other than his housekeeper to take care of his children, is not admissible upon the question of contributory negligence.

SAME.—*Knowledge of Danger.*—*Duty to Avert.*—Where one knows of danger which threatens injury to himself or those to whom he is bound to afford protection, and he can by reasonable exertion avert it, his negligent failure to do so will prevent a recovery.

TRESPASS.—*Abating Nuisance.*—Where one creates a dangerous nuisance upon the property of another, the latter, for the purpose of abating it, may go upon the property of the former without becoming a trespasser.

From the Allen Superior Court.

J. Morris, C. H. Aldrich and J. M. Barrett, for appellant.
H. Colerick and W. S. Oppenheim, for appellee.

MITCHELL, C. J.—James Burns brought this action against Sarah Mayhew, to recover damages for wrongfully causing the death of his infant child.

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| 108 | 328 |
| 128 | 428 |
| 108 | 328 |
| 134 | 512 |
| 103 | 328 |
| 139 | 544 |
| 103 | 328 |
| 140 | 243 |
| 103 | 328 |
| 147 | 678 |
| 108 | 328 |
| 151 | 44 |

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Mrs. Mayhew is a married woman, and the wrong complained of is, that being the owner of lot 24, in one of the additions to the city of Fort Wayne, she caused an excavation, for a privy vault, to be made on her lot, so near the division line between it and lot 23, on which the plaintiff lived, as that two feet of the soil from plaintiff's lot, and the division fence between the two, fell into the excavation. It was averred that the excavation was negligently permitted to remain open and unguarded, notwithstanding the plaintiff, upon discovering its dangerous condition, gave notice to the defendant, and requested that it be made safe. The plaintiff was a widower with five children. The children, with his household, were in the care of his sister-in-law, who was competent to have them in charge. While in her charge, his son, aged two years, fell into the excavation, which was filled with water, and was drowned. It is alleged that this occurred without fault or negligence on the part of the plaintiff.

He claims damages for the loss of the services and society of his child from the time of his death until he should have attained his majority. The action is brought by the father in his own right.

At the threshold we are met with the objection that a father can maintain no action, in his own right, to recover for the death of his child, or for the loss of services of one whose death has been caused by the wrongful act or omission of another. It is said there is no statute in force in this State giving the right, and that none exists by the common law. That it was the settled rule of the common law that the death of a human being could not be complained of as an injury in a civil court, is a proposition universally admitted, both in England and in this country. A parent might and still may, without any statute, recover for loss of services resulting from a wrongful injury to his child during the period of disability occasioned by such injury, and if death resulted, for the loss of service during the time between the injury and death. In addition, a parent had his common law

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remedy to recover for such incidental damages, as for medical attendance, care and nursing, up to the time of death, if death resulted. This was upon the theory that the parent was entitled to the services of the child at the time the injury was inflicted, and owed the child the corresponding obligation of care, nursing and medical attendance. If the right to the child's service or the duty of care and maintenance was at an end, then no right of action for an injury existed in favor of the parent.

Where death resulted instantaneously, or practically so, and no incidental expenses accrued, no action whatever was maintainable by the parent after the death of the child.

The claim which is pressed in the argument is, that the complaint counts upon a common law right, none having been given by statute, and that inasmuch as the injury and death occurred at the same time, and as no incidental expenses are alleged, it is contended, the complaint states no cause of action.

The argument that there is no statute giving a right of action to the father for an injury causing the immediate death, or for the lost services, of his minor child, is rested mainly, if not entirely, on what is said in *Gann v. Worman*, 69 Ind. 458. It was said in that case that "There is no statute in this State giving the father the right of action for the lost services of his child, after the child's death." It was also held in that case, as also in one or two others which preceded it, that sections 27 and 784 of the code of 1852—sections 266 and 284 of the present code—were to be construed together, and, when so construed, it resulted that the right of action given to the parent by section 27 was given not for his benefit, but as the representative of the deceased child, and that the damages recoverable in an action under that section inured to the benefit of the next of kin under section 784. *Pittsburgh, etc., R. W. Co. v. Vining's Adm'r*, 27 Ind. 513; *Cincinnati, etc., R. R. Co. v. Chester*, 57 Ind. 297.

The later case of *Pennsylvania Co. v. Lilly*, 73 Ind. 252,

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as also the earlier, *Ohio, etc., R. R. Co. v. Tindall*, 13 Ind. 366, proceeded with apparent recognition of the right by both parties, upon the theory that the parent had the right to recover the value of a child's services, although death in both cases was instantaneous.

In the case of *Pennsylvania Co. v. Lilly, supra*, it was said: "It is well settled that, in an action by a parent for the death of his child, he is entitled to recover only for the pecuniary injury he has sustained, and that the proper measure of damages is the value of the child's services from the time of the injury until he would have attained his majority, taken in connection with his prospects in life, less his support and maintenance. To this may be added, in proper cases, the expenses of care and attention to the child, made necessary by the injury, funeral expenses and medical services." This last case proceeded upon the theory that the damages thus defined might be recovered by the father in his own right, and nothing was said in relation to either section of the statute above mentioned.

The case of *Ohio, etc., R. R. Co. v. Tindall, supra*, clearly recognized the right of the parent to sue as such. It was there held that as the mother—the father having died—was entitled to the wages of her deceased son, she was damaged by his death, and might therefor maintain the action. Referring to the statutes above mentioned the court said: "These two statutes may be reconciled and given effect to, by holding the latter" (784) "applicable to the cases of adults, and the former to those of infants."

The question was suggested incidentally in *Binford v. Johnston*, 82 Ind. 426 (42 Am. R. 508). The complaint was held sufficient in that case because it was averred in one of the paragraphs that the father had expended money and rendered services in endeavoring to cure his son, and that he lost his services from the time of the injury to his death. These averments constituted the statement of a good cause of action, even at common law, and as it was not necessary to

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do so, it was not there determined whether or not the statute gave a right of action to a father for the death or lost services of his child after its death. It would seem fit that the question should have farther examination.

The statutes involved in the consideration of the question are sections 266 and 284 of the present code. These sections correspond in all material respects with sections 27 and 784 of the code of 1852.

Section 266 is as follows: "A father (or in case of his death, or desertion of his family, or imprisonment, the mother) may maintain an action for the injury or death of a child, and a guardian for the injury or death of his ward. But when the action is brought by the guardian for an injury to his ward, the damages shall inure to the benefit of his ward."

Section 284 enacts that "When the death of one is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action therefor against the latter, if the former might have maintained an action, had he lived, against the latter for an injury for the same act or omission. The action must be commenced within two years. The damages can not exceed ten thousand dollars, and must inure to the exclusive benefit of the widow and children, if any, or next of kin, to be distributed in the same manner as personal property of the deceased."

Do these statutes create distinct and independent rights, or is the proper construction of the former merely to define who are proper parties for the enforcement of the right conferred by the latter when the death of a child is wrongfully caused?

To hold that section 266 does not give a father, or mother under the contingencies stated, an independent right of action for the injury or death of his child, necessarily results in holding that it is of no practical force whatever. It is thus practically abrogated by construction. To say that the right of action given to the father for the injury or death of a child, means nothing more than that he is the proper party in whose name the right to damages given under section 284

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may be enforced for the benefit of the next of kin, is to say that it gives the father no right at all. Nor does such construction in any manner enlarge or aid the right given under the latter section. That section provides that the personal representative of one whose death has been wrongfully caused may maintain the action. The right of action is not expressly limited to the age or situation of the person whose death has been caused, but the provision that the damages shall inure to the benefit of the widow and children, if any, or next of kin, implies that there are or may be persons in that relation who were dependent upon the deceased, and who are consequently injured by his death. This could hardly occur in case the death was that of a child. It seems to us a forced and unwarrantable conclusion to say that in case the death is that of a child, section 266 is to be looked to for the purpose of ascertaining who is to sue as the representative of the next of kin; while in the case of an adult the personal representative, as defined in section 284, must sue. The reasonable and natural interpretation of the language employed in the first section is to give the parent who sustains injury by the death of his child, a remedy for such injury in his own right; while the latter gives to the widow or next of kin, through the personal representative, a right to recover for any injury which they may have sustained by reason of the death of an adult, or one emancipated from parental service, and in whose life they may have had a pecuniary interest.

By the common law the father had no right of action for lost services after the death of his child, and the effect of section 266 is to confer to that extent a new and independent right. In our view both the common law and statutory damages may be recovered under that section, as they are defined in *Pennsylvania Co. v. Lilly*, *supra*, and, when recovered, they belong to the parent in his own right, and are not distributable under section 284. During the continuance of the relation of parent and child, the right of action is in the parent

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entitled to its services. This relation presumptively continues during the minority of the child. *Pennsylvania Co. v. Adams*, 55 Pa. St. 499; *North Penn. R. R. Co. v. Kirk*, 90 Pa. St. 15; *Pennsylvania R. R. Co. v. Zebe*, 33 Pa. St. 318. If the relation does not exist, then the action is to be brought by the personal representative, regardless of the age of the person whose death has been caused, provided there are persons sustaining such relation as that they may be supposed to have sustained pecuniary injury on account of such death. If the relation of parent and child continues after majority, the parent receiving support or service may nevertheless maintain the action. In such case, the reasonable expectation of pecuniary advantage by the relation remaining may be taken into account, and damages given for the probable pecuniary loss occasioned. *Dalton v. South-Eastern R. W. Co.*, 4 C. B. N. S. 296; *Franklin v. South-Eastern R. W. Co.*, 3 H. & N. 211; *Pennsylvania Co. v. Adams*, *supra*. This view accords with the construction given similar statutes in England and some of the states in this country, and does not expose the wrong-doer to the hazard of being twice sued for the same wrong, as was suggested might be the case in *Pittsburgh, etc., R. W. Co. v. Vining's Adm'r*, *supra*. Where the death wrongfully caused is that of a child owing service to the parent, the pecuniary interest which its next of kin can have in its life is so remote and subject to so many contingencies that it would be little less than speculation to say they had any interest which could afford a basis for estimating damages. In such case, the right of action is in the parent or guardian, under section 266.

Where the wrongful act or omission occasions the death of an adult, or one not in the service of his parent, or in whose life a widow, children or next of kin may, on account of their relation or situation, have a pecuniary interest as such, the right of action is in the personal representative for their benefit, and in such case the right is exclusively under section 284.

This we think is what was meant when it was said in *Ohio*,

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etc., *R. R. Co. v. Tindall*, *supra*, "These two statutes may be reconciled and given effect to, by holding the latter applicable to the cases of adults, and the former to those of infants."

Certainly, any other construction practically abrogates the one and gives an interpretation to the other which does not arise out of the language employed in either.

It must be considered that these statutes are the means of introducing into our system principles wholly foreign and unknown to the common law. The first, by adding to the common law right, which the father had, the further right to maintain an action for the death of a child. The second, by giving to the widow, children or next of kin, through the personal representative, a right to recover for the loss which they had sustained on account of the death of one in whose life they may have had a pecuniary interest.

Under the first section, the damages recoverable are arrived at from a consideration of the probable value of the child's services from the time of the injury until it would have attained its majority, taken in connection with its expectancy and prospects in life, less the probable cost of support and maintenance; added to this the expenses of care, attention, etc., made necessary by the injury, as stated in *Pennsylvania Co. v. Lilly*, *supra*.

Under the second section, it is evident the damages are to be considered in each case according to its circumstances. In assessing damages resulting to the wife, children or next of kin, the ability of the deceased to have provided for the support and education of those dependent upon him, the number and degree of kindred mentioned in the statute, and their dependence upon him for support, are important considerations.

Although it is not necessary to the maintenance of the action for the next of kin that the deceased should have been under a legal obligation to render them support, it is nevertheless of consequence that their relation and situation should be shown with a view of affording a basis upon which to de-

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termine the amount of pecuniary loss sustained. 2 Williams Ex'rs (6th Am. ed.), p. 874, note d.

The two sections above quoted were, we think, intended to accomplish the same end as the statutes 9 and 10 Vict., c. 93, commonly known as Lord Campbell's Act.

These views find support more or less remotely in the cases already cited, and in the following, among other, cases, which, while they are under statutes not entirely like those above set out, nevertheless afford some analogy in principle. *Walters v. Chicago, etc., R. R. Co.*, 36 Iowa, 458; *Whitford v. Panama R. R. Co.*, 23 N. Y. 465; *Needham v. Grand Trunk R. W. Co.*, 38 Vt. 294; *Ohio, etc., R. R. Co. v. Tindall, supra*.

The conclusion thus reached results in the approval of *Pennsylvania Co. v. Lilly, supra*, and in modifying *Gann v. Worman, supra*, and to some extent the other cases giving the like construction to statutes above set out.

The suit having been brought by the father as such, it was, therefore, not necessary to aver who were the next of kin, or that there were any.

It is further contended that the complaint was bad, because it is said, notwithstanding the averment that the plaintiff was without fault, there arises from the facts stated therein such a presumption as shows contributory negligence on his part. That such might be the case, has frequently been held. *Bedford, etc., R. R. Co. v. Rainbolt*, 99 Ind. 551, and cases cited. We think, however, in this case, the specific statement of facts is not such as to enable the court to say, as matter of law, that the plaintiff was guilty of negligence, over the general averment that he was without fault.

It is also made a question whether the wife can be sued separately in tort and held liable, where it appears, as it is contended it does in this case, that the wrong committed was the joint tort of the husband and wife, and presumably committed in his presence. Without reference to the rule of the common law upon this subject, married women are now by statute made liable, and an action may be prosecuted against

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them, for torts committed, as if unmarried. Section 5120, R. S. 1881. Where the wrong relates to the use or management of their separate estates, as in this case, the torts of married women, committed by the violation of any duty imposed upon them by law with respect to such estates, create the same liability against them as if they were unmarried. And this would be so without regard to the statute above referred to, under the maxim *sic utere*, etc. Having been relieved of their disabilities and empowered to own and control separate estates as *femmes sole*, they take the right with all its incidents, and must, therefore, like all other persons, use their property with due regard for the rights of others. *Rowe v. Smith*, 45 N. Y. 230; *Vanneman v. Powers*, 56 N. Y. 39; *Baum v. Mullen*, 47 N. Y. 577; *Cooley Torts*, 118.

We think section 5121, R. S. 1881, which provides that when a married woman commits a tort by the direction of the husband, etc., she shall be jointly liable with him, relates to the mere personal torts of the wife, and has no application to a case like this.

It is contended that in making the excavation on her lot, the appellant was in the exercise of a lawful right, and that the extent of her liability in making it so near the division line as to cause the earth from the lot occupied by the plaintiff to fall into the excavation, was to pay for the subversion of the earth thus occasioned. We think this view of the case can not be maintained. The right to make the excavation on her lot may be conceded, but to do so in such manner as to remove the lateral support from the other, and by that means cause a pitfall thereon, was to commit a nuisance. If, without the plaintiff's fault, his child fell into the pit thus formed, and the loss of its life resulted, the defendant is liable. *Cooley Torts*, 594. The demurrer to the complaint was properly overruled.

At the trial the plaintiff gave testimony tending to show that he was a widower, and by occupation a helper in a black-

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smith shop; that his eldest child was thirteen, and the youngest, the one drowned, two years of age; that his sister-in-law, a competent person for that purpose, had the charge of his household and children.

There was also evidence showing that the plaintiff had been informed of the dangerous condition of the excavation in his back lot, and that he had given notice to the defendant's husband to make it secure. He was also informed that a few days before the death of his child one of its older brothers, Eddie, had fallen into and had been rescued by the housekeeper from the same place.

The evidence tended to show that the housekeeper, at the time of the occurrence which resulted in the death complained of, was engaged about the necessary duties of the household, having permitted the child to go temporarily into the back yard under the supervision of its elder sister. That she had observed it but a moment before sitting near its sister and another child, and upon looking again missed it, and subsequently recovered its body from the excavation, too late to save its life.

In this state of the evidence, the plaintiff, being on the witness stand, was asked the following question: "Tell the jury what property you own." Over objection he was permitted to answer, and said: "I have no property; I am a poor man, and was not able to employ anybody else to take care of my children."

In support of the ruling of the court in admitting this evidence, it is contended that the pecuniary condition of the plaintiff was material to be considered in determining whether or not he was guilty of contributory negligence. The argument is that the plaintiff was not bound to confine his child to the house, and that if he was unable to employ a nurse or other attendant, negligence should not be imputed to him.

If it should be conceded that the pecuniary condition of one to whom negligence was imputed should be considered in any case, for the purpose of determining whether or not

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he was negligent, we can discover no reason for considering it in this case. Whether the plaintiff was negligent or not, depends upon his personal conduct, considered with reference to the danger, of the presence of which he had knowledge. The inquiry involved the acts or omissions of the plaintiff, and those having the care of his child, as such acts or omissions related to the danger, the child, and the knowledge of facts with which they were chargeable.

Neither of the parties to this suit could excuse his negligence, if he was negligent, by bringing either his own or the other's pecuniary condition into the controversy, nor could the fact of negligence be determined in that way. If the defendant committed a nuisance by wrongfully causing a pitfall on the plaintiff's lot, she could not escape liability by showing that she was poor and the plaintiff rich. It would have availed her nothing to show that the plaintiff might have employed more servants to attend his house, or nurses for his child. Nor was it necessary for the plaintiff to offer any excuse or apology for not employing nurses or attendants. The question related to his own care, and the prudence and judgment of those to whom the care of his child was actually committed.

It can not be assumed that every person who is pecuniarily able to do so employs, or must employ, an attendant for his child or a servant to assist his housekeeper. Wives and housekeepers of every degree of fortune may choose to attend their own households and children, and no wrong-doer may excuse his wrong by asserting negligence against them on account of their choice. What some must do, in respect of denying themselves servants, or their children attendants, every other may do, and whether done from choice or necessity, negligence can not be predicated upon the one or excused by the other. Whether one was negligent or not in a given case, must be determined by considering his or her conduct as it related to the particular circumstances of the occasion or affair, out of which the case arises.

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It can not be solved by showing their general pecuniary condition. Their ability to act and what they did or omitted to do with reference to the particular emergency, is all that is important. All that was necessary for the plaintiff to show in this case was the actual situation of his household, and that neither he nor those to whom he had intrusted his child were guilty of any act or omission in relation to the child and the excavation into which it fell. This was a question of conduct, not of property. The ability to apprehend and guard against the danger when apprehended, and the acts and omissions of the plaintiff and his housekeeper after the facts were known, were all the subjects material to the inquiry. His duty as it related to his child, and the source of danger were the same whether his household was managed as it was from choice or necessity. It would be monstrous to assume that the care or solicitude of a parent for the safety of a child in respect of danger to its person had any relation to his pecuniary condition. We may say at once that if any negligence was imputable to the plaintiff, it did not relate to the want of a suitable housekeeper, or the want of attendants for his child.

The pertinent inquiry was, how came it that the excavation was left unguarded after knowledge of its existence? Did the plaintiff or his housekeeper omit any act or precaution which ordinary prudence would have suggested, under the circumstances of which they had knowledge, and which in the situation in which they actually were they might have taken? That it was competent for him to show where and how his family were situate, and how he was employed, we have no doubt. But whether he lived at the place or in the manner he did, or was employed as he was from one cause or the other, could make no difference.

We find no case in which the question here raised has been directly ruled. Cases are cited in which judges, in the course of their opinions, have given expression to sentiment, which on a casual survey might seem to justify the introduction of

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such testimony as that admitted. Such are the following: *Isabel v. Hannibal, etc., R. R. Co.*, 60 Mo. 475; *O'Flaherty v. Union R. W. Co.*, 45 Mo. 70; *Pittsburyh, etc., R. W. Co. v. Pearson*, 72 Pa. St. 169; *Kay v. Pennsylvania R. R. Co.*, 65 Pa. St. 269; S. C., 3 Am. R. 628; *Philadelphia R. R. Co. v. Long*, 75 Pa. St. 257; *Chicago, etc., R. R. Co. v. Gregory*, 58 Ill. 226; *Höppe v. Chicago, etc., R. W. Co.*, 61 Wis. 357; *Walters v. Chicago, etc., R. R. Co.*, 41 Iowa, 71.

Without entering upon an examination of the cases, we are content to say, after the fullest consideration, that we think no principle can be found upon which the admissibility of the evidence can be vindicated.

The law does not set up one standard by which to determine the rights or measure the conduct of the rich, and another for the poor. Its protecting shield is extended alike over all. Its pride and glory are to mete out equal and exact justice to all, in the same scale, rich and poor alike. In this, all find security and protection. *Hagan's Petition*, 5 Dillon, 96; *City of Delphi v. Lowery*, 74 Ind. 520; S. C., 39 Am. R. 98.

The cases relied on are cases where children escaped from the observation of persons in whose care they were left, and sustained injury by going on railway tracks.

It is said in most of these cases that parents who are poor frequently find it necessary, while engaged about other duties, to leave their younger children in the custody of elder sisters or brothers who have attained to sufficient age and intelligence to guard them from danger, and that negligence should not be imputed to them if they escape their oversight and sustain injury. We should have no difficulty in saying as much, regardless of the pecuniary condition of the parents. We can conceive of no attendant who would be more solicitous for the welfare of an infant than its elder sister or brother, who was of sufficient age and intelligence to be left as its guardian. It is idle to say that the propriety or impropriety of

so leaving an infant is to be determined by an inquiry concerning the amount of property the parent owns.

It is said in one case that it "can not be claimed that a laboring man, or his wife, though confined to her room by sickness, must give their personal attention and oversight to their infant child, in order to avoid the imputation of negligence. Certainly when they provide fences and gates properly secured and fastened, and placed the child in care of a proper person to take care of and watch over it, they can not be personally charged with negligence." *Walters v. Chicago, etc., R. R. Co., supra.* The inquiry arises, would personal negligence be imputable to any one whose wife was in like condition, and who had taken like precautions for the safety of his child? What must one's occupation be in order that the law shall say he is not a "laboring man," and that he or his sick wife shall be required to give their "personal attention and oversight to their infant child," and not place it in the care of a proper person to watch over it without the hazard of being accounted negligent?

Industry and labor are the rule, and are to be commended in every station in life, and whether one is a laboring man, in the sense that instead of taking the personal supervision of his infant children, he may commit them to the care of other competent persons, can not be determined on the basis of property.

We can discover no principle upon which it can be determined whether negligence can be attributed to one, in a given case, by an inquiry into the state of his fortune. It was error to admit the testimony.

The court gave, over the objection of the appellant, the following charge:

"It devolves upon the plaintiff to show, not only the negligence of the defendant or defendants, but that the accident happened without fault on his own part or on the part of the person or persons having the care of the child. But negligence is not to be imputed to the plaintiff on the ground that

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he did not go upon the lot on which the hole was dug, and either cover or fill it up or barricade the hole—such entry, without authority, upon the lot on which the hole was dug, would have been a trespass which he was not bound to commit.”

We think this instruction was, to say the least, liable to mislead the jury. The jury may have understood from it that although the defendant created a nuisance on the plaintiff's lot, if, in order to abate it, it became necessary to go upon her lot to do so, special authority to that end was required.

The evidence tended to show that by reason of the removal of its lateral support, the soil from plaintiff's lot, together with part of the division fence, fell into the excavation on the defendant's. It can not be questioned that if this caused a dangerous nuisance on the plaintiff's lot, he had the right to go upon the defendant's without becoming a trespasser, for the purpose of taking up the fence and abating the nuisance. *State v. Flannagan*, 67 Ind. 140; *Cooley Torts*, p. 46.

The defendant requested the court to give the following instruction :

“ If, therefore, you find from the evidence that the plaintiff had knowledge of the dangerous condition of the vault in question for two or three weeks before the death of the child, and that by reasonable caution and exertion he could have placed a fence or barricade between said vault and the lot on which he lived, and thereby have prevented the injury to his child, but negligently omitted to do so, he can not recover in this action.”

This was refused. There was evidence to which the instruction asked was applicable, and we think it should have been given.

Where one knows of danger which threatens injury to himself, or those to whom he is bound to afford protection, if by reasonable exertion he can avert such injury, and negligently omits to do so, he can not recover damages when the injury which he might have prevented comes. 1 *Thomp. Neg.* 169.

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In such cases the inquiry is, was there reasonable cause to anticipate injury from the danger of which knowledge was had, and was reasonable care taken to avert it?

It is insisted with much earnestness that the whole evidence shows that the plaintiff was guilty of contributory negligence, and that for that reason the judgment ought to be reversed. As, in our view of the case, the trial seems to have proceeded upon an erroneous theory as to what might be negligence on the part of the plaintiff, we deem it better to reverse the judgment for the errors indicated, without expressing any opinion upon the evidence, and let the case go back for such proceedings as the plaintiff may choose to take upon the law as herein laid down.

We have examined the other questions argued, and without extending this opinion to state the reasons in detail, we think there was no error in the rulings complained of other than as above indicated. For these, and upon the reasons given, the judgment is reversed, with costs.

ZOLLARS, J., did not participate in the decision of this case.

Filed Oct. 27, 1885.

No. 12,035.

HUGHES ET AL. v. THE STATE.

CRIMINAL LAW.—*Malicious Trespass.—Real Estate.—Title.—Evidence.—*

Where, in a prosecution for malicious trespass to real estate in tearing down and removing a fence thereon, there was no evidence tending to prove that the real estate upon which the fence stood belonged to the person named in the affidavit as owner, a conviction can not be sustained.

SAME.—*Claim of Title.—Intent.*—Where the evidence shows that the trespass complained of consisted in the removal, by the employees of a railroad company, of a fence from real estate claimed by the company, to protect its rights, a charge for malicious trespass can not be rightfully prosecuted, in the absence of any malicious intent.

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SAME.—Private Wrongs.—The machinery of the criminal law can not be properly invoked for the redress of merely private grievances.

From the Fayette Circuit Court.

R. D. Marshall and *W. C. Forrey*, for appellants.

F. T. Hord, Attorney General, *R. Conner*, *H. L. Frost*, and *L. H. Stanford*, Prosecuting Attorney, for the State.

NIBLACK, J.—An affidavit was filed before a justice of the peace of Fayette county, charging Martin Hughes, Louis P. Snyder, John Remington, Peter Bainbridge and others with having, on the 13th day of June, 1884, unlawfully, maliciously and mischievously injured the real estate of one Abram B. Conwell, by then and there unlawfully, maliciously and mischievously tearing down and removing a rail fence situate upon said real estate, to the damage of said real estate and of the said Conwell in the sum of \$25.

The justice found the defendants, particularly named as above, guilty, and assessed and adjudged a fine against each one of them severally.

Upon an appeal to the circuit court, Hughes, Snyder and Bainbridge were tried together, the trial resulting in a verdict and judgment against all of them. A question was made at the proper time upon the sufficiency of the evidence to sustain the verdict, and that is really the controlling question now presented for our decision.

The leading facts which gave rise to this prosecution were substantially as follows: On the 14th day of March, 1854, the Junction Railroad Company, of which the Cincinnati, Hamilton and Indianapolis Railroad Company is the successor, purchased a tract of land, now in the city of Connersville, containing a fraction over eleven acres on which its freight and passenger depots were afterwards placed, and through which its main track and several side-tracks were laid. At the time of the purchase a starting point for the survey and description of the tract of land covered by it was agreed upon, but no deed was then made.

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In April, 1866, Conwell laid out and platted a piece of land contiguous to the tract sold by him to the railroad company, into lots and streets known as "Conwell's northeast addition to Connersville." A question afterwards arose, and, as we infer from the evidence, still remains unsettled, whether this addition to Connersville did not lap over onto and encroach upon the railroad tract of land. In April, 1871, Conwell executed to the railroad company a deed of conveyance for a tract of land containing a fraction over eleven acres, which was intended and mutually understood as embracing the precise land bargained for by the railroad company in the first instance. Soon after this deed was executed, some one erected a rail fence along what the railroad company claimed to be the northern boundary of the tract of land thus conveyed to it by Conwell, and the company continued thereafter to claim title up to that fence. Some time after this fence was erected, nothing showing how long, Conwell became dissatisfied with its location as a boundary line between him and the railroad company, and asserted a claim to a strip of ground south of the fence which afterwards became disputed territory between him and the company. With the coming of the spring of 1884, the controversy over this strip of ground became more definite and aggressive. Early in May of that year, Conwell caused a new survey to be made of the premises, and that survey resulted in staking off and marking a line about four rods further south than the fence as the supposed true boundary line. The railroad company refused to recognize the correctness of that survey and so the controversy continued. In the meantime, some efforts looking to an amicable adjustment were made by the company under circumstances which gave some promise of success. With the view apparently of bringing matters to a crisis, Conwell, on the 13th day of June, 1884, caused the old fence to be moved further south and put up on or near the line indicated by the new survey. The chief engineer

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of the Cincinnati, Hamilton and Indianapolis Railroad Company, which had some years previously succeeded to the property and franchises of the Junction Railroad Company, had, at the time, his office in Cincinnati, Ohio, and upon being informed of the change of the line of the fence telegraphed to the appellant Snyder, who was one of his subordinate officers at Connersville, to have the newly put up fence removed. Snyder accordingly, at about five o'clock in the afternoon of the same day on which it was erected, assembled a company of men in the employment of the railroad company, and caused the new fence in question to be thrown down and the rails scattered. Hughes and Bainbridge, the other appellants, were members of the company of men thus assembled by Snyder and assisted in the work of throwing down the fence.

It must be borne in mind, that the charge in this case was for an alleged injury done to the real estate of Conwell by tearing down and removing a fence situate upon and connected with such real estate, and not for any injury which may have been committed upon the fence itself. To sustain the charge made by the affidavit, it was, consequently, necessary to prove that the real estate upon which the fence stood belonged to Conwell. *Powell v. State*, 2 Ind. 550; *Reinhard Criminal Law*, 94.

Taken as a whole, there was no evidence either proving or fairly tending to prove that the title to any part of the disputed territory was in Conwell, or that he had ever been in possession of that strip of ground. The fair inference from the evidence was, that Conwell had for a considerable time asserted a claim of title to the disputed territory, and that both he and his agent had perhaps spoken of it and referred to it as his land, but no evidence was offered to formally sustain that claim of title, and nothing came out incidentally which could be properly construed as sustaining such claim. Conceding that the railroad tract of land did not extend be-

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yond the line indicated by the last survey, it did not follow, in the absence of any evidence on the subject, that Conwell owned the land on the other side up to that line. Proof that the rails belonged to Conwell was not sufficient. If proof of property in, and injury to, the fence or rails was relied upon for a conviction, then the charge ought to have been for injury to the fence or rails, and not to the land. Then, also, the evidence tended to prove, and as to that there was seemingly no conflict, that at the time the chief engineer gave the order for the removal of the fence, he was under the impression that the land on which it had been placed belonged to the railroad company, and had no other object in view than the protection of the rights of the company; also, that the men who obeyed his order and threw down the fence did so under the belief that they were simply obeying a lawful order and doing what was presumably for the best interests of the company.

A civil action for a trespass may be maintained in a class of cases for the purpose of testing and settling a question of title, but a charge of malicious trespass can not be rightfully prosecuted for such a purpose, since, however conclusive the evidence of title in the prosecuting witness may be, the defendant may nevertheless be acquitted on proof of a *bona fide* claim of title, and in the absence of any malicious intent in the transaction. Besides, the machinery of the criminal law can not be properly invoked for the redress of merely private grievances. Moore Crim. Law, section 987, *et seq.*; *Howe v. State*, 10 Ind. 492; *Windsor v. State*, 13 Ind. 375; *State v. Bush*, 29 Ind. 110; *Palmer v. State*, 45 Ind. 388; *Dawson v. State*, 52 Ind. 478; *Lossen v. State*, 62 Ind. 437; *Gundy v. State*, 63 Ind. 528.

The evidence, as we find it in the record, impresses us very strongly with the belief that the controversy involved in this case is one which ought to have been determined by an appropriate civil action, and not by a resort to a criminal pros-

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ecution. Everything considered, we feel constrained to hold that the verdict was not sustained by sufficient evidence.

The judgment is reversed and the cause remanded for further proceedings.

Filed Oct. 28, 1885.

No. 11,736.

TUCKER ET AL. v. CONRAD.

DEDICATION.—*Passive Acquiescence, with Knowledge, in Use of Uninclosed Lot in Town for Street Purposes.*—Mere passive acquiescence, with knowledge, by the owner of an uninclosed and unimproved lot in a town or city, in its use by the public for street or highway purposes, until such time as he may be able and willing to improve the same, does not constitute a dedication.

SAME.—*Evidentiary Facts.*—*Intended Dedication.*—Evidentiary facts, tending to prove an intended dedication, or from which it might possibly be presumed, are not themselves such an intended dedication.

SAME.—*User.*—*General Highway Law.*—It seems that the provisions of section 5035, R. S. 1881, in relation to highways by user, are not applicable to the public streets of a town or city.

SUPREME COURT.—*Joint Assignment of Error.*—*Practice.*—An alleged separate error against one of several appellants is not presented on appeal by a joint assignment of error by all.

From the Kosciusko Circuit Court.

L. H. Haymond, L. W. Royse, H. S. Biggs and J. W. Cook,
for appellants.

J. S. Frazer and W. D. Frazer, for appellee.

HOWK, J.—In this case the appellee, Conrad, sued the appellants, Tucker, Greene and the city of Warsaw, in a complaint of two paragraphs. The object of the suit was to recover damages for breaking and entering, as alleged, the appellee's close, destroying his fences, etc. The close in question is described as lot No. 58, in the original plat of the town, now city, of Warsaw, in Kosciusko county. The appellants' defence was that such lot or close had, with the ac-

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quiescence of the owners thereof from time to time, and by its long user by the public as a thoroughfare, become a public street or highway of the town or city of Warsaw. Issues were joined in the cause by the appellants' answers in general denial of appellee's complaint, under which answers it was agreed by all the parties to the record that all proper matters of defence or reply, without having been specially pleaded, might be given in evidence. The cause was tried by a jury and a special verdict was returned, whereon the appellants, as well as the appellee, moved the court for judgment. The appellants' motions were severally overruled, but the court sustained the appellee's motion, and rendered judgment in his favor for the damages assessed and costs.

Errors are assigned here by the appellants which call in question the rulings of the trial court upon the several motions for judgment on the special verdict.

The findings of the jury, in their special verdict, are stated in separate paragraphs, numbered from 1 to 23, both inclusive. Of these the first ten paragraphs contain an equal number of links in the chain of appellee's title to the lot in controversy, giving the kind and date of each deed, and the names and residence of the grantors and grantees respectively therein. In this chain of title, the first deed was dated October 20th, 1836, and the last deed, which was executed to the appellee, was dated July 18th, 1867, and the jury found that the "plaintiff, Conrad, has been the owner of said lot No. 58 ever since said 18th day of July, 1867, to the present time, and is still the owner thereof."

In the remaining paragraphs of their special verdict the findings of the jury were, in substance, as follows:

11. In December, 1846, a road was opened, being the road now in controversy, commencing on Buffalo street, in the town, now city, of Warsaw, and running diagonally across said lot No. 58, north 45° east, until it intersected a public highway, known as the Warsaw and Goshen road, which last men-

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tioned highway was then, and has been since, known in the town, now city, of Warsaw, as Detroit street.

12. Said road, passing diagonally over such lot 58, was opened up by the public in December, 1846, as a public highway, and it was at that time intended by the public that it should be a public highway, and has been ever since until July 1st, 1866, at which time it was obstructed by a fence built by John R. Nye, and money and labor have been expended thereon by the public authorities, from year to year, from the last mentioned date until the present time; and such road has been occupied, used and travelled by the public generally, as a public highway, from July 1st, 1866, continually to May 23d, 1882, when it was obstructed by a fence built by plaintiff, Conrad; and from May 25th, 1882, up to the present time, it has been constantly used by the public.

13. The plaintiff, on or about the 23d day of May, 1882, built a board fence across such public highway in and upon said lot No. 58, and thereby wholly obstructed the travel thereon. On or about the 25th day of May, 1882, the defendant Edmund J. Greene, as the then mayor of the city of Warsaw, and the defendant Calvin Tucker, as the then city marshal and street commissioner of the city of Warsaw, as such public officers, directed so much of said fence as obstructed said public highway to be taken down and removed, and no more; and no more of such fence was in fact removed than what obstructed such public highway.

14. By the direction of such officers of the city of Warsaw so much of said fence as obstructed said public highway was, on or about the 23d day of May, 1882, removed, and no more, and the same was removed in a careful manner, thereby doing no more damage to the lumber and material composing such fence, and to the premises, than was necessary to remove the obstruction.

15. The road in controversy, passing diagonally over lot 58, had been used continuously, excepting the time it was obstructed by John R. Nye as aforesaid, by the general public

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as a public highway, and worked by the public authorities for more than twenty years prior to the commission of the grievances complained of, with the knowledge and acquiescence of the owners of said lot.

16. Prior to the commission of the acts complained of by plaintiff in this action, the said Henry C. Millice, while he was seized in fee of said lot 58, allowed that portion of such lot occupied by said public highway to be used for the purpose of a public highway, and the public then and there accepted the same, and have worked and continually used and travelled the same from that time to the present, except when obstructed by plaintiff as aforesaid.

17. The plaintiff, Conrad, was the owner of said lot 58 for about fifteen years before he built the fence thereon, described in his complaint, during all which time there was a road passing over and across said lot, being the road in controversy, which was continuously used by the public as a public highway, and was worked and kept in repair by the public authorities; and during all said time the plaintiff, Conrad, resided in the town, now city, of Warsaw, and had full knowledge all the time that such road was so used, travelled and worked by the public, and during all said time neither by word nor act made any objection thereto.

18. Since the location of the road in controversy on said lot 58, an addition to the city of Warsaw has been laid out north of such lot, on the west side of said Buffalo street, and all the lots in such addition have been improved, and residences and ice-houses built thereon north to the lake; and the people residing in such addition have no means of ingress and egress eastward except on and along such public highway in controversy, and if such public highway were closed up, their said property would be of less value than it now is; and on the east side of said Buffalo street an addition has been laid out to the city of Warsaw, which would be less valuable if such public highway were closed up.

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19. The public highway in controversy is a public highway of general public utility.

20. To replace the fence removed would cost \$5.

21. Since the location of the public highway in controversy, an addition to the town, now city, of Warsaw, was laid out immediately east of the eastern terminus of such public highway, and a portion of the lots in such addition have been improved by the erection of residences thereon, all of which property would be of less value if such public highway were closed up.

22. At the time of the location of the public highway in controversy, over and across said lot No. 58, such lot had only a nominal value.

23. And we further find that the public highway, at its eastern terminus on Buffalo street, has been moved a little to the north of its original location.

Upon the facts found by the jury in their special verdict, the substance of which we have given, did the trial court err in rendering judgment for the appellee? Or, in other words, are those facts sufficient to show a dedication by the appellee or any of his grantors, near or remote, of his lot in the town or city of Warsaw, described in his complaint, or any part thereof, to the purposes of a street or public highway? Can it be correctly said that the owner of an unenclosed and unimproved lot, in a town or city, who knows of and passively acquiesces in the use by the public of such lot or part thereof, for street or highway purposes, until such time as he may be able and willing to inclose and improve the same, thereby dedicates such lot or part thereof to the use of the public for such purposes? We are of opinion that each of these questions must be answered in the negative.

It will be observed that the jury have nowhere found, in their special verdict, any express or actual dedication by the appellee or any of his grantors, near or remote, of his lot in the town or city of Warsaw, or any part thereof, to or for

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the use of the public for street or highway purposes. Nor have the jury found, in any of the paragraphs of their special verdict, that the appellee or any of his grantors, near or remote, ever intended to dedicate the lot described in his complaint, or any part thereof, to or for the use of the public for street or highway purposes. Upon these points, it is true that, in their special verdict, the jury have found a number of evidentiary facts, such facts as might possibly have been evidence of an intended dedication, or have justified a presumption of dedication, if applied to an ordinary highway. But the jury have wholly failed to find, in any of the paragraphs of their special verdict, the *animus dedicandi* on the part of the appellee or any of his grantors, near or remote; and in the absence of such a finding, the trial court could not do otherwise, upon the other facts found by the jury, than to render judgment for the appellee. Evidentiary facts, tending to prove an intended dedication, or from which such a dedication might possibly be presumed, are not of themselves such an intended dedication. *Mansur v. State*, 60 Ind. 357; *Mansur v. Haughey*, 60 Ind. 364; *Mauck v. State*, 66 Ind. 177; *Ross v. Thompson*, 78 Ind. 90; *Faust v. City of Huntington*, 91 Ind. 493.

The evidence is not in the record, except, possibly, so much thereof as the jury have set out in their special verdict, and that does not make it a part of the record to be considered here as evidence. It does not appear, at all events, that all the evidence given in the cause is contained in the special verdict, and it was not otherwise made a part of the record. If it were conceded that the statutes of this State in relation to public highways were applicable to the public streets of a town or city, the jury did not find that appellee's lot or any part thereof had been continuously used as a public highway, without objection and obstruction on the part of the lot-owner for any period of twenty years or more. It can hardly be said, however, as it seems to us, that the provisions of

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section 5035, R. S. 1881, in relation to highways by user, are or were intended to be applicable to the public streets of a town or city. All such streets are public highways, but all public highways are not streets. Under the statutes of this State, towns and cities have exclusive power over the streets, alleys and highways within their limits, and the board of commissioners of the county have, of course, no power or authority over any such street, alley or highway for any purpose, without the consent of such towns or cities. *Sparling v. Dwenger*, 60 Ind. 72.

It is further claimed that the trial court erred in rendering judgment against the city of Warsaw. There is no separate assignment of error by the city of Warsaw, and the joint assignment of error by all the appellants does not present the decision complained of by the city for our consideration. *Boyd v. Pfeifer*, 95 Ind. 599; *McKee v. Hungate*, 99 Ind. 168; *Hinkle v. Shelley*, 100 Ind. 88.

We have found no error, in the record of this cause, which requires the reversal of the judgment.

The judgment is affirmed, with costs.

Filed Oct. 27, 1885.

 No. 12,193.

WOLF v. TRINKLE ET AL.

ASSAULT AND BATTERY.—Measure of Damages.—Instruction.—In an action by a woman for damages resulting from an indecent assault and battery, it is not error to instruct the jury that while exemplary damages can not be given, the jury, in arriving at compensatory damages, are not necessarily restricted to the naked pecuniary loss, but may allow such damages as are the direct result of the act complained of, and for injury to reputation, social position, physical suffering, mental anguish, sense of shame, humiliation and loss of honor.

SAME.—In such case a new trial will not be granted for excessive damages unless they are so clearly excessive as to indicate that the jury acted from prejudice, partiality or corruption, or were misled as to the measure of damages.

From the Lawrence Circuit Court.

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G. W. Friedley, E. D. Pearson, T. B. Buskirk and W. H. Martin, for appellant.

S. B. Voyles and H. Morris, for appellees.

ZOLLARS, J.—The evidence in this case tends to show, that at about eight o'clock at night, when appellee Jeremiah Trinkle was away from home, and his wife, Louisa E., was there alone with three small children, and in a delicate condition, appellant went to the house, and, without any forewarning or bidding, opened the door and went in. Louisa E. was in bed with her children at the time. After a few words had passed between her and appellant, he went to the bed, pushed back the covers, laid hands upon and took improper liberties with her person, and so acted as to indicate a lascivious purpose. He remained at the bed for a half hour or more, but, being repelled by her, he desisted and shortly afterwards left the house. The fright to her was such that she got up and remained up the balance of the night without sleep. The evidence also tends to make good the averments of the complaint, that by reason of the indecent assault and battery upon her, she has undergone, and is still undergoing, physical and mental suffering.

While the evidence tends to establish the above and foregoing facts, because of contradictions and conflict therein, the case is not a strong one in some of its features. But as the jury and the trial court have passed upon the evidence, and as it tends to support their conclusion, we must treat the case as having been made out in favor of the real plaintiff Louisa E. Trinkle.

In response to her demand for damages, the jury awarded \$500 in her favor, and, over a motion for a new trial, judgment was rendered against appellant for that amount.

The court charged the jury as follows: "5. If you find for the plaintiff, you will assess in her favor such damages, within the amount claimed, as you think she has sustained, and which will be a compensation to her for any loss and injury

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occasioned, which are the direct results of said defendant's conduct."

The court also gave to the jury the following instruction asked by appellee:

"No. 1. While the jury are not authorized by the law to give exemplary or punitive damages in this case, in the event a verdict is found for the plaintiff, yet, if the jury find for the plaintiff, full compensatory damages should be awarded, and in arriving at compensatory damages, the jury are not necessarily restricted to the naked pecuniary loss; for, besides damages for pecuniary loss or injury, the jury may allow such as are the direct consequence of the act complained of, for injury to Mrs. Trinkle's good repute, her social position, for physical suffering, bodily pain, anguish of mind, sense of shame, humiliation, and loss of honor."

It was urged below in the motion for a new trial, and is urged in argument here, that the damages are excessive. It is also urged in argument here, that the above instructions tended to augment the damages, by creating the impression in the minds of the jurors that damages in excess of the injury suffered might be awarded. We do not think that the instructions are open to this objection. The jury was charged in these instructions, in explicit terms, that exemplary or punitive damages could not be awarded, and that the damages should be limited to such injury as was the direct result of appellant's wrongs. The special injuries for which damages might be awarded were not improperly stated. It is well settled, that in a case of the character of this, damages may be awarded for physical suffering, for mental trouble, as anguish of mind, sense of shame or humiliation, loss of honor and good name, all of which are considered compensatory, and not exemplary or punitive damages. *Stewart v. Maddox*, 63 Ind. 51; *Cox v. Vanderkleed*, 21 Ind. 164; *Taber v. Hutson*, 5 Ind. 322; *Fisher v. Hamilton*, 49 Ind. 341; *Lake Erie, etc., R. W. Co. v. Fix*, 88 Ind. 381 (45 Am. R. 464); *State, ex rel., v. Stevens*, *ante*, p. 55.

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In a case like this, where these elements of damages are to be considered by the jury, the amount to be awarded must necessarily rest, to a large extent, in the discretion and sound judgment of the jury. Such a case is peculiarly one where this court should hesitate before overthrowing verdicts and judgments, on the ground that the damages awarded are excessive. The general rule is, that new trials will not be granted for excessive damages unless they are so clearly excessive as to indicate that the jury acted from prejudice, partiality or corruption, or were misled as to the measure of damages. *Kelsey v. Hay*, 84 Ind. 189, and cases there cited; *Lake Erie, etc., R. W. Co. v. Fix*, *supra*, and cases there cited; *Indiana Car Co. v. Parker*, 100 Ind. 181, and cases there cited.

We think there is no error in the record for which the judgment should be reversed. The judgment is, therefore, affirmed, with costs.

Filed Oct. 29, 1885.

No. 11,957.

MANSUR ET AL. v. STREIGHT ET AL.

REAL ESTATE, ACTION TO RECOVER.—*Right to Possession.*—*Complaint.*—Under sections 1050 and 1054, R. S. 1881, a complaint to recover the possession of real estate, which fails to allege that the plaintiff is entitled to the possession, or facts showing such right, is bad both before and after verdict.

SAME.—*Defect not Cured by Verdict.*—The omission from the complaint of a fact essential to the plaintiff's cause of action is not cured by verdict.

From the Marion Superior Court.

H. J. Milligan, B. Harrison, W. H. H. Miller and J. B. Elam, for appellants.

J. A. Holman and F. Winter, for appellees.

MITCHELL, C. J.—The only question presented by the record and assignment of errors in this case involves an in-

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quiry concerning the sufficiency of the complaint after a finding and judgment for the plaintiff. The suit was to recover the possession of certain real estate in the city of Indianapolis.

Section 1050, R. S. 1881, provides that "Any person having a valid subsisting interest in real property and a right to the possession thereof may recover the same by action to be brought against the tenant in possession," etc.

Section 1054 is as follows: "The plaintiff in his complaint shall state that he is entitled to the possession of the premises, particularly describing them, * * * and that the defendant unlawfully keeps him out of possession."

The averments in the complaint material to be noticed are, that the plaintiffs are the owners of the land in controversy, and that the defendants "unlawfully keep them out of possession of the same."

It is contended that because the complaint did not contain the averment that the plaintiffs are entitled to the possession, it was not sufficient.

For the appellee, it is argued that even though the complaint may not have been sufficient, as against a demurrer, it is good after finding and judgment. That an averment that the plaintiff is entitled to the possession is essential to withstand a demurrer in actions like this, is settled. *Miller v. Shriner*, 87 Ind. 141; *McCarnan v. Cochran*, 57 Ind. 166; *Levi v. Engle*, 91 Ind. 330.

In *Swaynie v. Vess*, 91 Ind. 584, it was held that while such averment was necessary, it was not required to be made in the exact words of the statute. If the averments in the complaint are such as to show the plaintiff's right to the possession, and that the defendant unlawfully detains it from him, it is sufficient.

Taking it as settled that it is necessary, either to aver in terms that the plaintiff is entitled to the possession, or to state facts from which his right of possession arises by nec-

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essary implication, the inquiry still remains, is the complaint in this record within the rule?

In actions of this character, it is settled that the plaintiff must recover on the strength of his own right. It is not enough to show that the defendant's possession is without right. He must aver and prove his right. It might have been conceded that the defendants had no right to the possession of the premises in dispute, and that they unlawfully kept the plaintiffs out, and yet the right of possession may have been rightfully in a stranger to the record. This is not the case of an essential averment inaccurately or defectively stated, but one where there is a total omission of a fact essential to the plaintiffs' cause of action. In such cases the omission is not cured by a verdict or judgment. *Eberhart v. Reister*, 96 Ind. 478; *Second Nat'l Bank v. Corey*, 94 Ind. 457. Other questions argued are not in the record.

For the reason that the complaint was insufficient, the judgment of the general term reversing the judgment of the special term is affirmed, with costs.

Filed Oct. 29, 1885.

No. 11,294.

PLATTER v. THE BOARD OF COMMISSIONERS OF ELKHART COUNTY.

COUNTY COMMISSIONERS.—*Power to Change Location of County Institutions.*—

The board of county commissioners has power to change the location of county institutions and to do all acts necessary to effect the change, and such power is a continuing one, not exhausted by a single exercise.

SAME.—Order of Discontinuance Before Selling County Poor Asylum.—It is not necessary for the board to pass an order formally discontinuing the county asylum for the poor prior to selling such asylum, for the purpose of locating it elsewhere.

SAME.—Power to Sell County Property.—Such board may sell property when in its judgment it is no longer required for county purposes.

SAME.—Ministerial Act.—Discretionary Power.—Special Session.—An order for the sale of county property is a ministerial act, calling into exercise

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the discretionary powers of the board, and such order may be made at a special session and executed when the board is not in session.

SAME.—*Delegating to Agent Power to Sell.*—The mere act of selling may be done by the county auditor at the direction of the board.

SAME.—*No Appeal from Ministerial Act.*—Where the board exercises judicial functions in adversary proceedings, involving private rights, there is a right of appeal, but such right does not exist where such board acts in a purely ministerial or administrative capacity.

SAME.—*Exercise of Statutory Power.*—Where the statute prescribes the mode of exercising a power, that mode must be adopted.

SAME.—*Notice of Sale.—Terms.—Price of Property Must be Fixed by Board.*—

Under the statute providing for the sale of county property by the board of commissioners, the notice of sale will be insufficient as to the terms upon which it is to be made, if it does not name the minimum price which it is the duty of the board to fix upon such property.

SAME.—*Kind of Security Must be Specified.—“Approved Security.”*—The notice of sale must also specifically state the kind of security which the purchaser will be required to give. It is not sufficient to designate it as a note with “approved security.”

SAME.—*Ratification.*—An act performed by a public corporation in violation of the terms of a statute can not be ratified.

SAME.—*Estoppel of Public Officers.*—One who deals with public officers with limited statutory powers is bound to ascertain the scope of their authority, and he can not found an estoppel upon acts done by them in excess of their authority.

SAME.—Where both the parties to a transaction have equal knowledge, or means of knowledge of all the facts, there can be no valid estoppel.

SAME.—*Action by Board to Annul Sale Made by Previous Board.*—An action may be maintained by a board of commissioners to set aside an invalid sale of county property made by a previous board.

PRACTICE.—*Finding by Jury in Equity Case.—Venire de Novo.*—In cases of equity jurisdiction, properly triable by the court, the finding of the jury will be treated as advisory unless it appears that the parties and the court treated the case as an action at law, and its form and contents are not material unless adopted by the court, and a motion for a *venire de novo* is not proper.

SAME.—*Province of Court.*—Although a finding has been made by a jury in a case properly triable by the court, the ultimate decision of all questions of fact, as well as of law, must be made by the court, and where it renders judgment according to the merits of the case, there can be no reversal.

SAME.—*Evidence.—Harmless Error.*—The admission of incompetent but harmless evidence is not available for the reversal of a judgment.

TENDER.—*Refusal to Hear Tender.*—One who, by his own conduct, prevents

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a full tender being made to him, can not afterwards complain that the tender made was not sufficiently specific.

From the LaGrange Circuit Court.

R. M. Johnson, J. Morris, H. D. Wilson, W. J. Davis, J. D. Ferrall, E. G. Herr and A. A. Chapin, for appellant.

J. H. Baker, J. A. S. Mitchell, F. E. Baker and W. L. Stonex, for appellee.

ELLIOTT, J.—The material facts alleged in the complaint of the appellee, exhibited in a condensed form, are these : In 1853 the county of Elkhart became the owner of a tract of land, and remained the owner of it from that time until 1882, using it during all that period as a poor farm, as it is called, for the maintenance of the paupers of the county. In February, 1883, the board were convened in special session, having been called together by a summons issued by the auditor, and on that day adopted the following preamble and resolutions :

“Whereas the board did, at the December term, 1881, to wit, December 7th, determine that it was for the best interests of Elkhart county to sell said poor farm, with the purpose in view of relocating said poor farm in a more eligible place; and whereas said board did on said day, in pursuance of said determination, direct said auditor to give notice by advertisement in the public newspapers in the county that said farm was for sale, and that in pursuance of said order and direction said auditor did thereafter give notice by publication in three newspapers of general circulation, printed and published in Elkhart county, for three successive weeks, that said poor farm was for sale and awaiting bids for the purchase thereof; and whereas this board did again convene on the 11th, 12th and 13th days of January, 1882, for the purpose of further considering the matter of the proposed sale of said poor farm, and this board did, on the 12th day of January, 1882, while so in session, in good faith attempt to sell and convey, and did make, execute and deliver a deed for said farm to Wil-

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liam D. Platter, at and for the agreed purchase-price of fourteen thousand dollars, which sum said Platter has paid into the county treasury ; and whereas complaints have been made that said farm above described was sold for a sum less than its real value, and that notice of the time, place and terms of the sale thereof was not given for the requisite time as by law in such cases made and provided, and that said sale was at private sale, instead of by public sale ; and whereas this board is of the opinion that it is and will be for the best interests of Elkhart county that the asylum for the poor of Elkhart county shall be discontinued at and on the above described land, and that said land should be sold at public sale, and that a sale thereof should be had at the earliest practicable day ; wherefore, in order to effectuate and carry out said determination, and that a perfect title and legal sale may be made of said poor farm, it is therefore ordered that the above described real estate be sold at public auction at the door of the court-house, in Elkhart county, Indiana, on the 20th day of April, 1882, between the hours of ten o'clock A. M. and two o'clock P. M. of said day, on the following terms, to wit : One-half of the purchase-price will be required cash on the day of sale, and the residue in one year from date of sale evidenced by note of purchaser, with six per cent. interest from date, waiving valuation and appraisement laws and attorneys' fees, with approved security.

"And it is further ordered that the auditor of Elkhart county cause notice of said sale to be given by publication in the Goshen Times, the Independent, and the Elkhart County Journal and the Monitor, each a weekly newspaper of general circulation, published and printed in Elkhart county, in each issue of said papers until the 20th day of April, 1882, and a copy of the notice of such sale be posted in five public places in said county, to wit : One at the door of the court-house, one each at the post-offices in Goshen, Elkhart and Middlebury, and one at the county asylum ; and the board further

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orders that the county auditor, either in person or by deputy, act as auctioneer of said sale."

That pursuant to such order the county auditor advertised the sale of such poor farm by publishing for sixty days immediately prior to the 20th day of April, 1882, the following notice:

"NOTICE OF SALE OF ELKHART COUNTY POOR FARM.

"Notice is hereby given that the board of commissioners of Elkhart county, Indiana, will offer at public auction, at the door of the court-house of said county, on Thursday, the 20th day of April, A. D. 1882, between the hours of ten o'clock A. M. and two o'clock P. M. of said day, the farm known as the poor farm of said county, described as follows, to wit:

"The southeast quarter of the southwest quarter, and the south half of the southeast quarter, of section twenty-five (25), in township thirty-six (36) north, and of range six (6) east, and the southwest quarter of the southwest quarter of section thirty (30), in township thirty-six (36) north, and of range seven (7) east, in said county, containing 160 acres.

"TERMS:—The one-half of the purchase-price will be required in cash on day of sale, and the residue in one year from the day of sale, the purchaser giving his note therefor with 6 per cent. interest, waiving valuation and appraisement laws, and attorneys' fees, with approved security, but the board reserves the right to retain possession of the asylum buildings until they can make suitable arrangements for the keeping of the poor elsewhere. By order of the board of commissioners, at special session, February 15th, 1882."

The board at the same special session ordered "that the auditor, either in person or by deputy, act as auctioneer of said sale." On the 20th day of April, 1882, at one o'clock in the afternoon, when the board was not in session, and could not be in session except upon the summons of the auditor, that officer read in the hearing of a number of persons then convened the notice of sale, and then and there stated that he would sell the poor farm to the highest and best bidder on

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the terms specified in the notice; no person made any bid except the appellant, and he only made one bid of twelve thousand dollars, whereupon the auditor declared the farm sold to him. The auditor accepted from the appellant as purchase-money six thousand dollars, and a note signed by him alone, and also received a mortgage on the farm to secure the note. On the 20th day of April, 1882, the board convened in special session upon the summons of the auditor, and received from the latter a report of the sale, as follows:

"The undersigned, auditor of said county, would most respectfully report to your honorable board, that in obedience to the order of this board made February 15th, 1882, he caused to be published in each of the following weekly newspapers, of general circulation in said county to wit, the Goshen Times and the Independent, of Goshen, and the Elkhart Review and the Elkhart Monitor, of Elkhart, the notice, a copy of which is filed herewith and made a part hereof, each week from said 15th day of February to this date, the first publication thereof being in the Goshen Times of February 16th, 1882, and by posting said notice in five public places in said county, as per proof of said posting filed herewith by the affidavit of the sheriff of said county, that by virtue and in pursuance of said order said board would sell to the highest bidder, on the terms mentioned in said notice, the following real estate, situated in said county and State, and described as follows, to wit: The southeast quarter of the southwest quarter, and the south half of the southeast quarter, of section twenty-five (25), in township thirty-six (36) north, and of range six (6) east, and the southwest quarter of the southwest quarter of section thirty (30), in township thirty-six (36) north, and of range seven (7) east, containing 160 acres.

"That, in pursuance of said order and notice, I did, between the hours of ten o'clock A. M. and two o'clock P. M. of the 20th day of April, 1882, as auctioneer, offer for sale at public auction said above described real estate at the door of

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the court-house, in said county, to the highest and best bidder, on the terms set forth in said notice, and William D. Platter having bid therefor the sum of \$12,000, the said realty was then and there openly struck off and sold to said William D. Platter for said sum of \$12,000, that being the highest and best bid therefor, and said William D. Platter being the highest and best bidder therefor, though more than fifty persons, resident taxpayers and citizens of said county were present during all the time of said sale, said William D. Platter paid down the one-half of said sum, to wit, \$6,000 cash, and executed his note secured by mortgage on said realty for the balance of said purchase-price, to wit, \$6,000, bearing interest from date, which note, mortgage and money so paid I now bring to said board. Said sale was in all things in accordance with said order and notice, and in said sale the possession and use of the asylum buildings on said premises were reserved for the purpose of the poor until suitable arrangements can be made for keeping them elsewhere."

The board approved the report, confirmed the sale, received the money tendered by Platter, and accepted his note and mortgage. Immediately upon the making of the order approving the sale, Milo S. Hascall and John H. Violett prayed an appeal and filed the proper bond. Notwithstanding the prayer of the appeal and the filing of the bond, the board executed a deed to Platter. Possession of the farm was taken by Platter, but before this action was brought a rescission was demanded, money, note and mortgage tendered back to him, and all things done by the county to place him *in statu quo*.

After the consummation of the sale to the appellant, the board of commissioners ordered notices to be published inviting proposals for the sale to the county of land suitable for a poor farm, notices were published, proposals were submitted, among others, one from Platter offering a farm owned by him for the price of \$30,000. The proposal of appellant was rejected, but four days afterwards, without further no-

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tice being published, the proposal was acted upon, and an order made for the purchase of the farm at the price of \$29,566. From this order an appeal was prayed by a number of taxpayers. Notwithstanding this prayer, the board received a deed from Platter and took possession of the land. Upon the question of selling, as well as upon the question of buying, there was one negative and two affirmative votes. The board was changed in March, 1883, by a new member coming into office, and within seven days after his accession to office, an order rescinding the orders relative to the sale and purchase was made, and proper offer and demand of rescission were made by order of the board. The prayer of the complaint is that the deed to Platter be set aside, and that of the county to him be annulled.

The complaint assigns as the reasons supporting the attack upon the validity of the proceedings the following :

"First. That the poor farm having been purchased by order of the board of commissioners in the year 1853, and an asylum for the poor having been duly organized and established and maintained thereon from that time to the date of the pretended sale, the commissioners had no power to sell said farm and the asylum thereon erected, without first passing an order that the asylum should be discontinued.

"Second. That the order and notice for the sale, having fixed the time for the sale by the commissioners on a date when by law they could not be in session pursuant to law, were void, and that the sale having been made at a time when they were not in regular session, in pursuance of such void notice, was void.

"Third. That the terms of sale, as fixed by the order and notice, were too uncertain, and that the sale was made in violation of the terms as set forth in the order and notice, and that it was, therefore, void.

"Fourth. That the sale could only be made by the board of commissioners when lawfully in session; that the board was not in session at the time the sale was made; that the

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board had not attempted to delegate their power to sell to an agent, nor could they if they had so attempted ; and that the sale, having been made at the court-house door when the members of the board were simply standing by as individuals, and not in session, was void.

"Fifth. That the conveyance of the farm to the appellant was void, for the reason that it was made after an appeal had been taken and allowed from the order of the board confirming the sale, which appeal was still pending at the time, and which suspended the power of the commissioners to proceed until it was disposed of."

The reason assigned for the invalidity of the order of the purchase from Platter is substantially this :

The purchase from Platter is void, because there had been no valid sale of the old farm, as he well knew.

The case has been argued orally and in written and printed briefs, these latter consisting of several hundred pages, and we have given it much consideration.

The first ground assigned in support of the attack upon the validity of the proceedings ordering the sale of the poor farm is not tenable. It was not necessary for the board of commissioners to formally order the discontinuance of the asylum originally established. The order for the purchase of a farm to which the board proposed to remove the asylum was a sufficient declaration of its judgment upon the question of a removal. Where the governing body of a county or a city makes an order in a matter over which it has jurisdiction, it is not necessary to declare the purpose of making it, nor to formally state the reasons for the order, nor to formally rescind or abrogate former orders. It is enough in such cases to make the order, without any formal statement of its purpose or effect, and the courts will determine its legal effect and ascertain its purpose. In determining to buy a farm for the location of the asylum, the board of commissioners necessarily determined to change its location. Where a judgment of a tribunal is involved in its order, it is not necessary to

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expressly state the grounds upon which it proceeds. *Board, etc.*, v. *Hall*, 70 Ind. 469; *Dillon Mun. Corp.* (3d ed.), section 318, auth. n. •

In determining to purchase a new location for the poor farm, the board necessarily determined the question of changing the old location, but in arriving at this conclusion it did not determine to discontinue the asylum for the poor—it simply changed its location. There is no provision in the statute inhibiting the board of commissioners from changing the location of county institutions.

The law commits to the board of commissioners very extensive powers over the property, finances and institutions of the county. In *State, ex rel.*, v. *Clark*, 4 Ind. 315, it was said of the board: "It has the care of the property of the county, as well as its supervision and management." The Supreme Court of the United States said: "It is for all financial and ministerial purposes the county." *Levy Court v. Coroner*, 2 Wall. 501.

We have not time to discuss or quote from the cases upon this point, but refer to them with the general statement that they will be found to agree in holding that the board of commissioners has very broad powers over county property and institutions, and that its discretion in the control and disposition of such institutions is seldom, if ever, interfered with by the courts. *Nixon v. State, ex rel.*, 96 Ind. 111; *Boehmer v. County, etc.*, 46 Pa. St. 452; *State Bank of Bay City v. Chapelle*, 40 Mich. 447; *Board, etc.*, v. *Bowen*, 4 Lansing (N. Y.) 24; *Shanklin v. Board, etc.*, 21 Ohio St. 575. Within the broad grant of power is included the subsidiary one of regulating county institutions and of changing their locations.

There are numerous decisions in our own reports declaring that the board of commissioners constitutes a corporation, and that its rights, duties and liabilities are substantially the same as those of a municipal corporation. In *State, ex rel.*, v.

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Clark, supra, it was said by this court that, "In legal contemplation, the board of commissioners is the county." This general doctrine has often received the approval of the court. *Hoffman v. Board, etc.*, 96 Ind. 84, *vide* auth. p. 86; *Nixon v. State, ex rel., supra*; *Patton v. Board, etc.*, 96 Ind. 131.

In *McCabe v. Board, etc.*, 46 Ind. 380, it was said: "We think it clear that the board of commissioners of a county is to be viewed as capable of acting in several capacities. It is undoubtedly true that the board is a corporation." The powers of the board are much discussed in *Miller v. Board, etc.*, 66 Ind. 162, and the rule was laid down that "corporations, along with the express and substantive powers conferred by their charters, take by implication all the reasonable modes of executing such powers which a natural person may adopt in the exercise of similar powers." In support of this position the court cited the cases of *New England F. & M. Ins. Co. v. Robinson*, 25 Ind. 536; *City of Lafayette v. Cox*, 5 Ind. 38; *Kyle v. Malin*, 8 Ind. 34; *Board, etc., v. Day*, 19 Ind. 450; *Haag v. Board, etc.*, 60 Ind. 511 (28 Am. R. 654); *Second Nat'l Bank v. Town of Danville*, 60 Ind. 564; *Board, etc., v. Saunders*, 17 Ind. 437. These authorities amply fortify the position that the board of county commissioners possess the usual powers of a public corporation over the property and institutions of a county, and it can not be doubted that the logical sequence is that the board may sell property when in its sound judgment it is no longer required for a county purpose, and may change the location of county institutions, if not forbidden, when it is required by the welfare of the people of the county.

In once locating a county institution the board of commissioners does not exhaust its power, for such a power, as is true of all general powers of a similar nature, is not exhausted by a single exercise. A power of the character exercised in this instance is a continuing one. *City of Kokomo v. Mahan*, 100 Ind. 242; *Bosley v. Ackelmire*, 39 Ind. 536. In the latter case the rule is applied to a case the same in

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principle as the present. No other rule, in our judgment, can be sound. It is for the authorities of the locality, and not for the courts, to determine what changes are required by the growth, expansion and other alterations in the condition and progress of a county. The case of *Hanna v. Board, etc.*, 29 Ind. 170, is not here in point, even if it can longer be deemed to be effective for any purpose. The question with which we are here directly concerned is not whether the board of commissioners may buy a second farm as an asylum for the poor, but the question is, can the county sell one farm preparatory to the purchase of another? Succinctly stated, the question is, can the board change the location of the county asylum?

We think there can be no doubt that if the board can change the location of an asylum, it may do all acts necessary to effect the change, for it is an elementary rule that the grant of a principal power confers all incidental ones.

In deciding that the board does possess the general power to change the location of county institutions, we have not solved the entire difficulty presented by the specification of the complaint under immediate discussion. Counsel cite us to a provision of the statute reading as follows: "Any asylum or farm provided by the board of county commissioners for the poor may be discontinued by such board, and the property, real and personal, relating thereto, which belongs to the county, may be sold." R. S. 1881, sec. 6098. We can not, however, regard this statute as of controlling force in this case. Here, the purpose is not to discontinue the asylum, but simply to change the location originally selected. The general power to sell is not taken away by the grant of a power to be exercised in special cases. *Leeds v. City of Richmond*, 102 Ind. 372. There is no antagonism between the general and the special power. *City of Vincennes v. Callender*, 86 Ind. 484. The board may well possess both powers.

We come now to the questions presented by the second spec-

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ification of the complaint. In our opinion these questions are settled against the appellee by the authorities. The law as established by the adjudged cases is this: Where there are adversary proceedings of a judicial character, and notice is required, the judicial functions must be exercised at a regular session of the board of commissioners; but where the business is of an administrative or ministerial character, it may be lawfully transacted at a special session properly convened. *Jussen v. Board, etc.*, 95 Ind. 567; *Oliver v. Keightley*, 24 Ind. 514; *Board, etc., v. Brown*, 28 Ind. 161. The distinction between the class of cases to which the present belongs, and that represented by the case of *City of Vincennes v. Windman*, 72 Ind. 218, appears from what is there said, and is so well and clearly defined in *Jussen v. Board, etc., supra*, that further comment is unnecessary.

Assuming, as the cases cited fully authorize us to do, that acts of an ordinary ministerial or administrative character may be transacted at a special session, all that remains upon this branch of the case is to determine whether the order to sell property is a ministerial or judicial act. We have a line of cases clearly and fully recognizing the distinction between the two classes of acts, the ministerial and the judicial, and to many of these we have already referred. We now refer to those especially addressed to this point: *O'Boyle v. Shannon*, 80 Ind. 159, and the cases cited; *City of Terre Haute v. Terre Haute, etc., Co.*, 94 Ind. 305, and authorities cited. Similar in principle to the present is the case of *Allen v. Cerro Gordo County*, 34 Iowa, 54, where the character of an administrative act is well illustrated. But the principle which rules here is so clear that we need not cite authorities. If making sale of property is a judicial act, then no sale can be made by any other than a judicial tribunal, not even by direct order of the Legislature itself (*Columbus, etc., R. W. Co. v. Board, etc.*, 65 Ind. 427), and we can not think that any one will contend that sales of property must be made by judicial tribunals.

We see no escape from the conclusion that a sale of county

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property is a ministerial act, and if it be, it is one to be exercised by the board of commissioners in its ministerial capacity. If it be granted, as we doubt not it must be, that the act is a ministerial one, then it is an act calling into exercise the discretionary powers of the board, and if the discretion is not abused the courts can not interfere. *Mayor, etc., v. Roberts*, 34 Ind. 471; *Bingham v. Board, etc.*, 55 Ind. 113; *City of Terre Haute v. Terre Haute, etc., Co., supra*; *City of Kokomo v. Mahan, supra*; *Andrews v. Board, etc.*, 70 Ill. 65; *Motz v. City of Detroit*, 18 Mich. 495; *Robertson v. Breedlove*, 61 Texas, 316.

It is our opinion that the order of sale was one which might lawfully be made at a special session of the board of commissioners, and that the court can not interfere with the exercise of the general power to sell the property of the county, on the ground that the order was made at a special session.

The fourth specification of the complaint belongs in logical order with those discussed, and, passing the third specification for the present, we address our attention to the former specification. We are clear that the cases to which we have referred, and the principles we have stated, rule the questions arising upon this specification, and that these cases and principles require us to decide all of these questions adversely to the appellee.

The act of executing the order of sale was a ministerial act. It was not, therefore, necessary for the board to be in session when this act was performed. The statute provides that sales of county property shall be made at public auction, and this implies that the usual method of conducting such sales shall be pursued. It can not be inferred that an auction sale shall be conducted by a judicial or legislative tribunal convened in actual session. The authorities heretofore cited declare that a board of commissioners possess ordinary corporate powers, and among such powers is that of selling and conveying property in substantially the same manner as natural persons. The power to sell includes the

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power to sell and convey in the usual method, unless a mode is prescribed by statute. Dillon Mun. Corp., sec. 578.

The act of selling the property was a purely ministerial one, and it was, therefore, such a power as the board might delegate to the auditor. Judge Dillon says: "But the principle that municipal powers or discretion can not be delegated does not prevent a corporation from appointing agents and empowering them to make contracts, nor from appointing committees and investing them with duties of a ministerial or administrative character." Dillon Mun. Corp. (3d ed.), section 96.

The fifth specification of the complaint belongs in proper order with those we have discussed, and we postpone the consideration of the third specification to discuss it. It is evident from what we have said and from the authorities we have cited, that there is no right of appeal in such cases as the present. This precise question is considered in many of the cases cited, and received very full and careful consideration in *O'Boyle v. Shannon*, *supra*. The law as firmly established by our decisions, and they stand on sound principle, is, that where the board of commissioners exercise judicial functions in adversary proceedings where private rights are concerned, there is a right of appeal, but that such a right does not exist where the board acts in a purely ministerial or administrative capacity. The case of *Grusenmeyer v. City of Logansport*, 76 Ind. 549, recognizes this doctrine, for the language employed by the court in that case, as well as the whole course of reasoning, shows with great clearness that the right of appeal exists only in cases where the board exercises judicial functions. In summing up the result of the review of the cases the court there said: "We therefore hold, that, under section 31 of the general law, there is a right of appeal from any decision of a judicial character, made by a county board in any proceeding." The opinion in *Hunt v. State, ex rel.*, 93 Ind. 311, shows the distinction between judicial and administrative acts, and under the rule there ap-

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proved, it is clear that the act of selling county property can not be considered a judicial one. The magnitude of the value of the property sold can not affect the question, and surely courts would not undertake on appeal to review the discretion of the board in ordering the sale of a desk, a chair or a building no longer needed for county purposes.

We have cited many cases, and might easily cite very many more, to the effect that courts can not supervise the exercise of a discretionary power, and to permit an appeal in such a case as this would violate that plain rule. Either the courts can or they can not revise the discretion exercised in selling property; that they can not we well know, and as they can not do this, there is no appeal, since to hold otherwise would be to declare that parties might do a vain thing, for such it would be to bring a case to a court that could take no legal action at all save to dismiss the appeal.

We do not question the proposition that where an appeal lies, and one is taken, the board can no further proceed in the case appealed. *Young v. State*, 34 Ind. 46; *Lincoln v. State, ex rel.*, 36 Ind. 161; *Blair v. Kilpatrick*, 40 Ind. 312. This, however, is a general rule to which there are marked exceptions. *Jeffersonville, etc., R. R. Co. v. McQueen*, 49 Ind. 64.

It is not necessary to here inquire what the exceptions are, for the rule can not apply where there is no right of appeal. The rule presupposes that there is a right of appeal; here there is none, and for this reason the case is not within the rule. A party can not stay proceedings by doing what the law does not authorize. A party can not appeal where there is no appeal. An act wholly unauthorized by law is void, and a void thing can confer no rights. Attempting to appeal where there is no appeal accomplishes nothing.

We now direct our discussion to the questions presented by the third specification of the complaint. Two questions arise upon this specification:

First. Was the notice given by the board of commissioners such as the law requires?

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Second. Was the sale made in violation of the terms of the order and notice?

Thus far we have considered and discussed the general powers of the board, and have not examined the mode of exercising the power to sell county property. We are now to consider the mode of exercising that power. It is a familiar rule that where the statute prescribes the mode of exercising a power, the mode prescribed must be adopted. *Leonard v. American Ins. Co.*, 97 Ind. 299; 1 Dillon Mun. Corp. (3d ed.), section 449.

Our statute does prescribe the mode in which the power shall be exercised; these are its provisions: "The board of county commissioners shall not be authorized to sell any county property, either real or personal, except at public auction, after advertising said property for sale sixty days, giving the terms, time, and place of sale, and a description of the property to be sold." R. S. 1881, sec. 4228. In order to make a valid sale, it was necessary for the board of commissioners to give, not only notice of the proposed sale, but also just such a notice as the statute prescribed. *McCrosen v. Lincoln County*, 57 Wis. 184.

We can not agree with the counsel for the appellee, that the notice is indefinite and uncertain as to the time and place of sale, for the order is that the sale be made at "public auction, at the door of the court-house, in Elkhart county, Indiana, on the 20th day of April, 1882, between the hours of ten o'clock A. M. and two o'clock P. M. of said day," and the notice given by the auditor copies the order in this respect.

We do not think that the time of making the sale depends, as counsel assert, upon the contingency of the board of commissioners being in session at the time and place appointed for the sale.

The question which we have found the most perplexing one is, whether the terms of sale are given either in the order or in the notice. A notice which omits to give the terms of sale can not be sufficient, for the plain reason that the statute im-

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peratively requires that the terms of sale shall be given. The courts can no more uphold a notice defective in one material particular than they can a notice defective in many particulars. We can no more dispense with the requirements of the statute upon one material point than upon another, and we could with as much show of right dispense with a designation of the time and place of sale as with a statement of the terms of sale. What the statute requires must be found in the notice, or it will be insufficient.

It must be kept in mind that the county corporation is an artificial person receiving all its powers from the statute which gave it existence. There is an essential difference between the rights of natural and artificial persons respecting the disposition of property. Natural persons have an inherent right of disposing of their property; while public corporations can only acquire and dispose of property by virtue of some positive law. Where the law designates the method, in which a corporation may dispose of its property, the method designated must be pursued, for there is no inherent right of disposition in corporate bodies. This general rule applies with peculiar force to officers placed in charge of the property of a governmental corporation. These officers have no direct private interest in the corporate property, and there is an absence of the influence of self-interest which impels men to vigilantly guard their private property. In order to supply, in some measure, at least, the place of that influence, the statute has imposed restraints upon the authority of the corporate officers, the commissioners, and has cast upon them duties, which, if faithfully performed, will prevent loss to the political corporation. The statute which governs here is unusually emphatic, for it in express words denies all authority to dispose of county property in any other mode than that prescribed. It not only prescribes a mode in which property may be disposed of, but, in plain, strong terms, excludes all others. A statute more strictly prohibitory could scarcely be conceived.

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The rule is, as we have suggested it should be, quite strict in cases where sales of public property are made by public officers. The reason for the rule and its strict enforcement is that officers exercise a naked statutory authority and have no other powers except such as are expressly or impliedly granted. *McCaslin v. State, ex rel.*, 99 Ind. 428; *Key v. Ostrander*, 29 Ind. 1; *Brown v. Ogg*, 85 Ind. 234; *Arnold v. Gaff*, 58 Ind. 543; *Vail v. McKernan*, 21 Ind. 421; *Williamson v. Doe*, 7 Blackf. 12; *Hastings v. Jackson*, 46 Cal. 234; *State v. Bevers*, 86 N. C. 588; *Stewart v. Otoe Co.*, 2 Neb. 177; *State v. Torinus*, 24 Minn. 332; *People v. Dulaney*, 96 Ill. 503, *vide* p. 508; *Gough v. Dorsey*, 27 Wis. 119; *Blodgett v. Hitt*, 29 Wis. 169; *Ray County v. Bentley*, 49 Mo. 236, *vide* p. 242.

From what we have said it is evident that the statute upon the subject of sales of county property must be applied in its full force and vigor, and, thus applying it, we must hold that the notice ordered by the commissioners and given by the auditor does not state the terms of sale. Whatever might be the just conclusion in other cases, we can see no way to avoid the conclusion that in such a case as this, and under the statute which governs it, the notice of sale is insufficient because it omits to name any price. We suppose it clear that the price of the property is one of the most important terms of a contract of sale. It is so regarded in cases arising under the statute of frauds. Wood Frauds, sec. 345, auth. n. 1. The phrase "terms of sale" means all the essential ingredients of the contract or transaction. If we give the word "terms" its usual and accurate force, we can reach no other result. Worcester says that one of the meanings of the word "terms" is: "Conditions; propositions; stipulations." And Webster gives substantially the same definition.

Unless we hold that the terms of sale must be fixed by the board of commissioners and stated in the notice, we should not only do violence to the language of the statute, but we

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should also run counter to settled rules of law. If the price is not fixed by the board of commissioners, then the person who cries the sale and accepts the bid really fixes the price of the property, and this the statute never contemplated. If the auctioneer may accept whatever price is offered, then it is he that makes the terms of sale, and if this be so, they could not be contained in a notice given sixty days previously. If we hold that the auctioneer may accept whatever price is offered, then the result is that we hold that the board may divest itself of the authority devolved upon it by the statute and delegate it to an agent. We think the statute means that the board shall designate a minimum price, state that in the notice as one of the terms of the sale, and offer the property at public auction for the purpose of securing, if possible, a greater price than that fixed. The valuation of the property must be determined on in advance of the notice, or else the terms of the sale can not be stated in the notice. We can not bring our minds to the conclusion that where no price is fixed the terms of the sale are stated, nor can we hold that the duty of designating the price can be entirely delegated to any person occupying the position of an auctioneer. The decision as to price requires the exercise of a discretionary power, and discretionary powers can not be delegated.

If, however, we are wrong in our conclusion that the price must be determined and stated in the notice, still the notice is insufficient, for the reason that it does not state what kind of security will be required. There are various kinds of security, and it is only fair to bidders that they be apprised in advance what security will be accepted. Some might be willing to secure the deferred payment by a mortgage on the land conveyed, and not willing to ask others to undertake as sureties for them; while others would be willing to furnish personal sureties, and unwilling to execute a mortgage. It is evident from the cases we have referred to, that sales of public property are watched with a jealous eye, and the provisions of a statute intended to prevent favoritism and ensure

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fair competition upon equal terms to all who choose to compete in bidding, are enforced with a firm hand. If the decision as to what security will be received be left until after the sale, a great purpose of the statute may be defeated, for bidders can not know what will be required of them, and the bids of some may be rejected because the security is unsatisfactory, although in truth entirely sufficient, and the bid of another accepted, although the security proffered is no better than, or, it may be, not so good as, that of other competing bidders. To permit this would be to tolerate a system which the statute intended to break down, and open a way to abuses which the statute was framed to prevent. The decision of the question of the character of the security that will be satisfactory, involves the exercise of a discretionary power, and is one that should be made in advance of the sale. Unless it is thus made, the terms of the sale can not be stated in the notice, and a notice which fails to state the terms of sale is insufficient. In cases of this class the rule as to the notice of sale is very strict. It is thus stated by one of our law-writers: "The notice of sale, as to manner and time, must be such as the order and statute direct, and must correctly describe the property. If given different in manner, or for less time than required by law, or the decree, the sale will be void." *Rorer Jud. Sales*, section 99.

The phrase "approved security" does not, as counsel assert, mean a note with personal surety, but means any security satisfactory to the officers having the power to approve it. We do not regard the sale as invalid because mortgage security was taken, but we do regard it as invalid because the notice did not state the terms of sale.

There is no force in the position of appellant that the ratification of the sale made it valid. The general rule applicable to public corporations undoubtedly is that an act performed in violation of the terms of a statute can not be ratified. *Dillon Mun. Corp.*, sec. 578. If it were otherwise a statute requiring notice might be rendered entirely nugatory by a board

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of commissioners; for, if it be true that a ratification validates, then the board might easily do by indirection what it could not do directly. This case is not one involving the question of the effect of a defective execution of a power, but it is a case where there was an attempt to do what the statute prohibits, for, as we have seen, it declares in plain terms that no sale shall be made except in accordance with its provisions.

The appellant can not successfully build upon the doctrine of estoppel. For this conclusion there are at least two satisfactory reasons: *First*. He dealt with public officers with limited, naked statutory powers; he was bound, at his peril, to ascertain the scope of their authority, and can not found any claim upon acts done by those officers in excess of their statutory authority. This general rule is thus stated by the Supreme Court of the United States: "Individuals as well as courts must take notice of the extent of authority conferred by law upon a person acting in an official capacity." The rule is well established by our own decisions. *Union School Tp. v. First Nat'l Bank*, 102 Ind. 464; *Reeve School Tp. v. Dodson*, 98 Ind. 497; *Axt v. Jackson School Tp.*, 90 Ind. 101; *Pine Civil Tp. v. Huber, etc., Co.*, 83 Ind. 121.

The disobedience of a statute by a public officer creates an incurable difficulty. It can not be remedied or removed by subsequent confirmation of the original acts, whatever the form the confirmation assumes. There is a well defined distinction between public and private corporations, and the general doctrine of estoppel does not apply to the former class of corporations. *Union School Tp. v. First Nat'l Bank*, *supra*; *Cummins v. City of Seymour*, 79 Ind. 491; *Driftwood, etc., T. P. Co. v. Board, etc.*, 72 Ind. 226.

A public corporation, such as a county or city, is composed of the inhabitants of the locality, and the officers are not agents in the strict sense of the term, but are persons acting in an official capacity. *Baumgartner v. Hasty*, 100 Ind. 575 (50 Am. R. 830); *Strosser v. City of Fort Wayne*, 100 Ind.

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443; *City of Valparaiso v. Gardner*, 97 Ind. 1 (49 Am. R. 416); *Axt v. Jackson School Tp.*, *supra*.

The acts of officers can not bind the local public by estoppel where the officers performing these acts can not bind them by a direct contract. It would be strange, indeed, if an estoppel could validate a sale of property made in violation of law, since, to allow an estoppel to so operate, would frustrate the purpose of the statute and enable the officers to do by indirect means what they could not do by direct proceeding. There may be cases in which a public corporation can be estopped, but this is not one of them, for here there is no possible legal method in which county property can be sold except that provided by law. The method by which a sale may be made is, in terms too clear for misconception, prescribed by the statute, and where the statute so positively restricts the alienation of public property to one method, it excludes all others.

The second reason supporting our conclusion is this: The appellant had full notice of all the material facts, and was warned that the sale would be attacked. He knew that the officers with whom he was dealing had once violated the law in selling him the property at private sale; he was warned at the sale that the taxpayers were objecting; he was notified by the appeal prayed that his right to hold the property would be assailed, and he knew that one of the commissioners was protesting against the proceedings of his associate officers. It is true that the appeal prayed did not operate to suspend proceedings, but it did convey notice. The taxpayers mistook their remedy, but their prayer of appeal and tender of bond was notice that they repudiated the action of the commissioners. The appeal may not have operated as constructive notice, but it did operate as actual notice. There was, therefore, neither concealment nor misrepresentation, nor was there knowledge on the one side and ignorance on the other. There is an entire absence of these elements of an estoppel. *Pitcher v. Dove*, 99 Ind. 175, see p. 178; *Mitchell*

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v. *Fisher*, 94 Ind. 108; *Anderson v. Hubble*, 93 Ind. 570, see p. 573 (47 Am. R. 394); *Buck v. Milford*, 90 Ind. 291; *Sims v. City of Frankfort*, 79 Ind. 446; *Robbins v. Magee*, 76 Ind. 381, and authorities cited. The general doctrine of these cases was applied to a private corporation in *Leonard v. American Ins. Co.*, 97 Ind. 299, where it was said: "It is well settled that where both the parties to a transaction have equal knowledge, or means of knowledge, of all the facts, there can be no valid estoppel."

This action is one of the class which taxpayers have a right to institute. They had a right to prevent the officers who represented the governmental corporation from wrongfully disposing of its property. *City of Valparaiso v. Gardner*, *supra*; *Dillon Mun. Corp.* (3d ed.), section 922. As the taxpayers might maintain an action such as this, we can conceive of no reason why this may not be maintained by the officers chosen by the taxpayers to represent them. The case does not belong to the class of actions which must be prosecuted in the name of the State.

We have considered and decided all the material questions presented by the complaint, and now turn to those presented on what is called the special verdict.

Objection is made that the finding of the jury does not state all of the material facts essential to a recovery, and that the motion for a *renire de novo* should therefore have prevailed. We can not regard the finding of the jury as within the ordinary rules applicable to special verdicts. The case is one of equity jurisdiction, and, of right, should be tried by the court. In all cases of this character the finding of the jury will be treated as advisory unless it appears that the parties and the court treated the case as an ordinary action at law. The ultimate finding is by the court, and it may accept or reject any or all of the findings of the jury. *Pence v. Garrison*, 93 Ind. 345; *Lake Erie, etc., R. W. Co. v. Griffin*, 92 Ind. 487; *Evans v. Nealis*, 87 Ind. 262; *Bacey v. Gallagher*, 20 Wall. 670.

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Under the rule laid down by these cases, the form and contents of the finding of the jury are not material unless it affirmatively appears that the finding was adopted by the court, for if not adopted it would not exert any controlling influence upon the ultimate decision of the case. Whether perfect or imperfect, the finding would be of little importance unless accepted by the court. It is far otherwise in an ordinary action at law, for in such an action the judgment must follow the verdict. The case in hand is easily discriminated from *Summers v. Greathouse*, 87 Ind. 205, for there the question was as to the procedure on the trial of a case treated by the court and the parties as an action at law. In this instance it appears that the case was not treated as an ordinary action at law, but rather as a suit in chancery, and therefore a motion for a *venire de novo* was not proper.

The principal questions presented by the ruling on the motion for a new trial have been disposed of in discussing the sufficiency of the complaint, and we proceed to those not already discussed.

We do not think any material error was committed in permitting copies of the deed to the county to be read in evidence. Appellant claimed title from the county, conceded that it owned the land, and certainly could not have been harmed by evidence tending to prove the county's title; so that, conceding, but by no means deciding, that the evidence was incompetent, still no harm was done appellant. *Wilson v. Peelle*, 78 Ind. 384; *Stockwell v. State, ex rel.*, 101 Ind. 1.

The affidavit and bond for appeal from the action of the commissioners were competent evidence, not because they proved that an appeal was rightfully asked, but because they tended to prove notice to the appellant of the objections to the proceedings of the commissioners.

The evidence shows that a person authorized to act for the county endeavored to tender a deed to the appellant and to make a proposition for rescission, but that the latter refused to listen to what was said, and referred the agent of the county

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to another person. We regard this evidence as sufficient to sustain the finding of the court. The appellant's refusal prevented a full tender, and he is not in a situation to complain that the tender made was not more specific. *Martin v. Merritt*, 57 Ind. 34 (26 Am. R. 45); *Duffy v. Patten*, 74 Maine, 396; *Frost v. Lowry*, 15 Ohio, 200.

Counsel for the appellant in their brief complain that the jury did not allow a sufficient sum as damages, and say: "True, the court attempted to fix the matter up, on the mistaken theory that this was a chancery case, and though the case had been fully submitted and tried by a jury, yet the court, instead of giving us a new trial when clearly entitled to it, undertook to do as it pleased, and assessed the damages itself." The authorities we have cited very clearly show that the court did right in revising the finding of the jury, for the ultimate decision of all questions of fact, as well as of law, must be made by the court in chancery cases, although it may, if it deems proper, accept the finding of the jury.

The decree of the court provides that the county "shall pay to the defendant \$3,895, with interest thereon from this date, and that the said sum of \$3,895 is to be paid in addition to the sum of \$6,360, paid by the defendant to the county, and in the hands of the treasurer, which sum the defendant is at liberty to receive from the treasurer." It appears from this that the court did act upon the evidence, and did assess in favor of the appellant all that he was entitled to receive. In such a case as this, if the ultimate finding of the court, and the decree following it, award justice to the appellant, there can be no reversal. *Krug v. Davis*, 101 Ind. 75, see p. 77.

The evidence shows that Platter had full knowledge of all the transactions and purposes of the board of commissioners, and it justifies the inference that the sale to him of the old poor farm, and the purchase of the farm from him were so woven together as to constitute one general transaction. We can not say that the trial court did wrong in con-

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cluding that the purchase from him depended for its efficacy upon the validity of the sale of the old farm.

We have already occupied so much time and space in the discussion of this case that we can not give the question under immediate mention a more thorough discussion.

Judgment affirmed.

MITCHELL, C. J., did not participate in the decision of this case.

Filed Oct. 7, 1885; petition for a rehearing overruled Dec. 30, 1885.

No. 11,695.

THE CHICAGO AND GREAT SOUTHERN RAILWAY COMPANY v. JONES.

PLEADING.—Amendment.—Supreme Court.—Practice.—The decision of the trial court granting or refusing leave to amend a pleading, where cause is shown, is not conclusive, and may be reviewed in the Supreme Court.

RAILROAD.—Appropriation of Land.—Amendment of Instrument of Appropriation.—Damages.—In a proceeding by a railroad company to appropriate land for a right of way, it has the right, upon cause shown, to amend the instrument of appropriation after the filing of the report of the appraisers and the joining of issues on exceptions thereto, by adding stipulations as to the maintenance by the company of fences and crossings calculated to reduce the amount of consequential damages.

SAME.—Injunction.—Pleading.—Practice.—An application for an order restraining a railroad company from further proceedings in the matter of appropriating land for railroad purposes must be based upon a complaint making a proper case for such relief.

SAME.—Appeal from Award of Appraisers.—Judgment for Damages.—Statute Construed.—Under section 3907, R. S. 1881, on appeal from the award of damages made by the appraisers in a proceeding to appropriate land for a right of way, the circuit court can only render judgment for the amount of compensation found due the owner, and a judgment enjoining the railroad company, on its failure to pay such amount within a certain time, from going upon or using such land until the same is paid, is erroneous.

From the Tippecanoe Circuit Court.

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G. W. McDonald, W. D. Wallace and T. C. Annabal, for appellant.

J. R. Coffroth and T. A. Stuart, for appellee.

NIBLACK, J.—Clement G. Jones was, on the 7th day of March, 1883, the owner of a tract of land in Warren county, over which the Chicago and Great Western Railway Company wished to obtain the right of way for its line of railroad, and the parties being unable to agree upon the terms upon which such right of way might be obtained, the railway company, on that day, deposited with the clerk of the Warren Circuit Court a written instrument of appropriation, particularly describing a strip of ground running across the tract of land in question, as the land intended to be appropriated for a right of way, and generally for railroad purposes. On the 17th day of the same month, the judge of the Warren Circuit Court appointed appraisers who made a report assessing Jones' damages at \$800. Jones filed exceptions to the report of the appraisers, to which replies were made at the ensuing term of the court last named. A change of venue was then granted to the Tippecanoe Circuit Court, where, at the second term after the cause had reached that court, the railway company asked leave and proposed, if permitted, to amend the instrument of appropriation, theretofore filed by it, by inserting therein, at a specified and appropriate place, the following:

"The said right of way so appropriated as aforesaid to be fenced by said railway company on either side thereof, with a good and substantial wire fence, consisting of five strands of wire, secured by and fastened to good oak posts set in the ground at proper distance from each other. And the said railway to be constructed in the said right of way with an underground passage under the track thereof, fifteen feet in width, giving free, easy and perpetual access to cattle, hogs, and other stock from each side of the right of way to the opposite field. The said fences and under-crossing to be con-

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structed and always maintained at the expense of said railway company."

In support of this application one of the directors of the railway company filed his affidavit stating, amongst other things, that at the time the proceedings to appropriate the right of way were commenced, it was uncertain whether the grades of the line of road to be thereafter adopted would be such as to admit of the construction of a crossing under the track of a depth sufficient to permit the free passage of cattle and other animals through the same; that since the commencement of such proceedings, the company had constructed its line of road over Jones' land upon a grade which permitted the making of such an under crossing, and that such a crossing had been then already begun and partially made; that the company had, also, already procured wire and posts to make a good and substantial wire fence across Jones' land on both sides of its line of road, which it was the intention of the company to erect without unnecessary delay, and to always maintain after its erection; that at the time the issues were closed upon the exceptions filed by Jones to the report of the appraisers, the company did not know that an under crossing upon the land in controversy was practicable.

A counter-affidavit was filed charging that since filing the instrument of appropriation the railway company had mortgaged its road, equipments and all other property then belonging to it, or thereafter to be acquired, to secure the payment of two millions of dollars and accruing interest.

The circuit court thereupon refused to permit the railway company to amend its instrument of appropriation as was proposed. The question as to the amount of damages to which Jones was entitled was then submitted to a jury, the result being a verdict in his favor for the gross sum of \$3,488.15, for which, with costs, a judgment of recovery was rendered against the railway company, describing the real estate for which the damages were assessed. To the judgment thus rendered was added the following:

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“ It is further ordered, adjudged and decreed by the court, upon failure to pay said damages for the period of thirty days, said defendant, the Chicago and Great Southern Railway Company, its servants, agents and employees, and the successors and assignees of said defendant, and their servants, agents and employees, and all persons acting by, through or under them, or either of them, be, and they and each of them are, forever enjoined and restrained from going upon, using, occupying or enjoying the said described real estate, or any part thereof, in any way whatever, or for any purpose, until the judgment aforesaid, principal and interest, shall be fully paid and satisfied.”

Questions are made in argument only upon the refusal of the circuit court to permit an amendment of the instrument of appropriation, and upon the judgment rendered upon the verdict.

Whether a party shall be allowed to amend his pleadings after the issues are closed, is a matter resting very much in the discretion of the *nisi prius* court. The fact that in such a case leave of court is necessary, implies the right of the court to refuse permission to amend in any case except upon good cause shown, and, even when a showing is made, the matter is still within the legal discretion of the court, the leave to be granted or refused accordingly. But the decision of the *nisi prius* court, when cause is shown, is not conclusive. It may be reviewed in this court, and will be disapproved when substantial injustice appears to have been done. Works Pr., section 700; *Burr v. Mendenhall*, 49 Ind. 496; *Shropshire v. Kennedy*, 84 Ind. 111.

Section 3909, R. S. 1881, extends the power to make amendments to cases of the kind now before us, and, in effect, makes the provisions of the civil code on the subject of amendments applicable to such cases.

In support of the decision of the circuit court refusing to allow an amendment of the instrument of appropriation, it is argued that, under our Constitution, no man can be compelled

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to accept benefits, easements or improvements, either in whole or in part, payment of land taken from him for railroad purposes, and that the proposed amendment was simply an effort to have the organic terms upon which the appropriation had been made so changed that the fencing and under crossing to be provided for would be considered in reduction of the damages to which Jones is entitled, and hence in partial compensation for the land taken from him, citing the case of *Lake Erie, etc., R. W. Co. v. Kinsey*, 87 Ind. 514.

It is true that Jones was, and still is, entitled to receive for his damages, whether for the value of the land taken, or as consequential damages resulting from the taking, a compensation in money, but that right on his part did not preclude the railway company from adopting and using every means at its command calculated to reduce the amount of consequential damages likely to result to him to the lowest practicable sum. When a railroad is run through or over the land of another, as in this case, the condition in which the remaining land is left, the inconvenience, danger or impossibility likely to be met in crossing, or attempting to cross, the road, and the amount of fencing to be made probably necessary, are all questions usually arising for the consideration of the jury. If, therefore, under the circumstances disclosed by the affidavits filed in this case, the railway company was willing to enter into special and additional obligations, bearing upon those questions, or any one of them, we think it ought to have been allowed to do so. Whether the proposed stipulations would have mitigated the consequential damages likely to be inflicted upon Jones, and if so to what extent, would have constituted matters for the consideration of the jury which afterwards tried the cause. These stipulations would, at all events, have created obligations running with the land, and would have been presumably of some value to Jones.

This view appears to us to have been well illustrated by some of the testimony given and other proceedings had at the trial. In answer to an interrogatory addressed to them the jury fixed

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the value of the land appropriated at only \$225. The consequential damages assessed, not deducting some interest allowed, were, consequently, more than fifteen times greater than the value of the land.

In a matter involving so much of what is usually regarded as the exercise of a merely discretionary power, we come to a conclusion different from that reached by the circuit court, with much hesitation and reluctance, but we feel, nevertheless, constrained to hold that the railway company ought to have been allowed to amend its instrument of appropriation as it was proposed to amend it.

As sustaining so much of the judgment appealed from, as contingently restrains and enjoins the railroad company and its successors from using or occupying the land appropriated, it is claimed that this court has made many precedents recognizing in principle the validity as well as the propriety of such an order, citing the cases of *Lafayette Plankroad Co. v. New Albany, etc., R. R. Co.*, 13 Ind. 90; *Graham v. Columbus, etc., R. W. Co.*, 27 Ind. 260; *Cox v. Louisville, etc., R. R. Co.*, 48 Ind. 178; *Lake Erie, etc., R. W. Co. v. Kinsey, supra*, and other authorities, discussing the power of the courts to restrain railroad companies in particular cases and in certain contingencies.

It has been held by this court, and that has now become the established rule of decision, that the owner of land may enjoin a railroad company from entering upon and appropriating any part of the premises until his damages have been first assessed and paid. But that rule does not apply where the railroad company has entered and is in possession under a license either from the owner or conferred by statute. *Buchanan v. Logansport, etc., R. W. Co.*, 71 Ind. 265; *Pittsburgh, etc., R. W. Co. v. Swinney*, 97 Ind. 586.

Section 3907, R. S. 1881, under which this proceeding was instituted, after providing for an appeal from the assessment of damages made by the appraisers by filing exceptions to their award, continues: "*Provided, That notwithstanding*

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such appeal, such company may take possession of the property therein described, as aforesaid, and the subsequent proceedings on the appeal shall only affect the amount of compensation to be allowed." We construe this proviso, when taken in connection with the other parts of the section, to mean that after the amount of the compensation, which ought to be allowed, has been ascertained by proper proceedings upon the appeal, the only thing remaining for the court to do is to render a judgment of recovery against the railroad company for the *amount* of compensation thus ascertained to be due for the land appropriated. There was, therefore, nothing in the nature of this proceeding which had any analogy to an application for an injunction, or which appealed to the merely equitable jurisdiction of the court.

When a railroad company, in its efforts to take and appropriate land for railroad purposes, places itself in a condition to be restrained from further proceedings in the matter of such appropriation, the application to have it so restrained must be based upon a complaint making a proper case for such relief. Consequently, so much of the judgment as contingently restrains and enjoins the railway company from using or occupying the land in controversy, as a means of enforcing the payment of the amount found to be due to Jones for his damages, is, in any event, erroneous. If that were the only error, it might be cured by a partial reversal of the judgment, but for error in not allowing the instrument of appropriation to be amended, the entire judgment, in our opinion, ought to be reversed.

The judgment is reversed with costs, and the cause remanded for further proceedings.

Filed April 21, 1885; petition for a rehearing overruled Nov. 3, 1885.

The Fremont Cultivator Company v. Fulton *et al.*

No. 12,204.

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ATTACHMENT.—Affidavit.—Motion to Quash.—Where, in attachment proceedings, the affidavit upon which the writ rests is insufficient, a motion to quash should be sustained, even though the motion does not specifically and with certainty point out any defects in the affidavit.

SAME.—Sufficiency of "Affidavit in Attachment and Garnishment."—Where an affidavit, endorsed "affidavit in attachment and garnishment," and filed with a complaint, contains, in addition to what is necessary to procure a summons in garnishment, all that is necessary in an affidavit for attachment, it will subserve both purposes, and uphold a writ of attachment.

SAME.—Nature of Claim.—An affidavit in attachment, stating that "the claim in this action is for money due on three promissory notes, copies of which are filed with the complaint, executed by the defendants to the plaintiff, that the claim is just, and that he believes the plaintiff ought to recover," etc., sufficiently describes the nature of the plaintiff's claim.

SAME.—Statute Construed.—Agent, Attorney or Officer.—Presumption.—A recital in an affidavit in attachment, that "The plaintiff's acting secretary, S. B., being duly sworn, upon his oath says," etc., is sufficient, the statute, R. S. 1881, section 916, not requiring a sworn statement that the affiant is the agent, attorney or officer of the plaintiff, and that he makes the affidavit in his behalf; and, in the absence of any showing to the contrary, that the affidavit is made in behalf of the plaintiff will be presumed from the fact that it is made by such agent, attorney or officer.

From the Jay Circuit Court.

S. W. Haynes, W. E. Cox, W. A. Thompson, J. W. Thompson, J. W. Headington and J. J. M. LaFollette, for appellant.

D. T. Taylor, J. M. Smith, T. Bailey, R. S. Gregory and A. C. Silverburg, for appellees.

ZOLLARS, J.—Appellant brought this action upon three promissory notes executed to it by appellees, one of which was due, and two of which were not due. At the same time the complaint was filed, two affidavits were filed. One, in the form of an affidavit in attachment, seems to have been upon the same paper with the complaint. In relation to the other, the record as made by the clerk states: "Said plaintiff

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also filed the following affidavit in attachment and garnishment." The statements in the bill of exceptions filed below and copied into and made a part of the record here, in relation to this affidavit, are, that the plaintiff, by its attorneys, "filed also its affidavit in attachment and garnishment for process of garnishment." A proper bond and undertaking was also filed at the same time.

It is further stated in the bill of exceptions, "that after the filing of the complaint, affidavits and undertaking, * * * the clerk issued writs of attachment and garnishment in said proceeding and suit." These writs were served, and a large amount of property was attached and taken into the custody of the sheriff.

In relation to the appearance by appellees in the court below, the statement in the record is, "Come the plaintiff by counsel, and come Messrs. Taylor, Smith and Bailey, and enter an appearance for the defendants in this action. Said attorneys also enter a special appearance to the attachment proceedings." Following this, appellees filed an affidavit of the non-residence of appellant, and moved for a rule upon it to file a bond for costs. A day later, appellees moved the court "to set aside and quash the writ of attachment and proceedings thereunder, for the reason that the affidavit filed by the plaintiff to procure said writ to be issued by the clerk is wholly insufficient." This motion was sustained, and appellant by counsel excepted. Afterwards, appellees filed an answer to the complaint, the cause was submitted to the court, a judgment was rendered in favor of appellant for the amount of the note due, and a finding was made, descriptive of the notes not due. On motion of appellees, the court ordered a restitution to them of the goods attached. To this, appellant, by counsel, again excepted.

Appellant has brought up the entire case by this appeal, and although there was no motion for a new trial below, the record and proper assignments here present for review the ruling of the court below in setting aside and quashing the

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writ of attachment, and in ordering a restitution of the attached property.

It is contended by appellant's counsel, that it was error to entertain and sustain appellees' motion to quash the writ of attachment, because the right to make and insist upon such a motion was waived by an appearance to the action.

We need not decide, or intimate here, what might constitute such a waiver. It is a sufficient answer to appellant's contention, that the record shows but a special appearance to the attachment proceedings.

It is further contended, that it was error to sustain the motion to quash, because it does not specifically point out the supposed defects in the affidavit upon which the writ rested. That kind of an objection might be available had the motion been overruled and the other side were complaining.

If there was no sufficient affidavit, the court properly sustained the motion to quash the writ, although it be conceded that the motion to quash it does not specifically and with certainty point out any defects in the affidavit.

The affidavit upon the same paper with the complaint, and called an affidavit in attachment, we think, is too indefinite and uncertain to meet the requirements of the statute.

As we have seen, there is a second affidavit, filed at the same time, and before the writ of attachment was issued. This the clerk calls an affidavit in attachment and garnishment, and such was the endorsement on the back of the paper by appellant's counsel. It is stated in the bill of exceptions, giving the paper the same name, that it was filed for process of garnishment. It is argued by counsel for appellant, that the writ of attachment may be made to rest upon this affidavit, which they assume is sufficient. This position is combatted by appellees, although they do not seem to so seriously question the sufficiency of that affidavit. Their position is, that in the natural order of things under the statute, the affidavit and writ in attachment precede the affidavit and writ in garnishment; that it should be presumed that the clerk

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pursued that order, and that hence the court could not, and can not, in order to uphold the writ in attachment and the proceedings under it, look to the affidavit denominated an affidavit in attachment and garnishment. It must be remembered, however, that the record shows affirmatively that this affidavit was on file before and at the time the writ of attachment was issued. That being the case, we know of no valid reason why that writ may not be made to rest upon and be upheld by that affidavit, if, in addition to what is necessary to procure a summons in garnishment, it also contains all that is necessary in an affidavit for attachment. We know of no reason why, in every case, the affidavit for attachment and garnishment may not be combined in one, upon the same paper.

It has been held that a complaint containing also what is required in an affidavit for attachment, if sworn to, may subserve the purposes of a complaint and the required affidavit for attachment. *Dunn v. Crocker*, 22 Ind. 324; *Waples Attachment*, 84; *Miller v. Chandler*, 29 La. An. 88. See, also, where the same rule is applied in actions of replevin, *Cox v. Albert*, 78 Ind. 241; *Watts v. Harding*, 5 Texas, 386.

In this last case the court said: "The petition is sworn to, by the petitioner; and the objection, that it is not sworn to, in a separate affidavit, does not seem well taken; all that is required by the statute, is, that those facts shall be sworn to, before an attachment shall issue." See, also, *Kinney v. Heuld*, 17 Ark. 397.

Our statute requires the statement of certain things and facts under oath before the writ of attachment may issue, and if that kind of an affidavit is made in the case, and lodged with the clerk before the writ is issued, it would seem that that should be sufficient, although combined with an affidavit for garnishment. The law regards the substance more than form or name. When we look to the affidavit here denominated an affidavit in attachment and garnishment, we find the following portion to be all that needs to be set out here, viz. :

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"The plaintiff's acting secretary, Samuel Brinkerhoof, being duly sworn, upon his oath says, that the claim in this action is for money due on three promissory notes, copies of all of which are filed with the complaint, executed by the defendants to the plaintiff; that the claim is just, and that he believes the plaintiff ought to recover \$523.80," etc. We think that this sufficiently describes the nature of the plaintiff's claim. *Theirman v. Vahle*, 32 Ind. 400.

The statute requires that in order that a writ of attachment may issue, "The plaintiff, or some person in his behalf, shall make an affidavit showing—*First*. The nature of the plaintiff's claim. *Second*. That it is just. *Third*. The amount which he believes the plaintiff ought to recover. *Fourth*. That there exists in the action some one of the grounds for an attachment above enumerated." R. S. 1881, section 916. The statute, it will be observed, requires that the affidavit shall be made by the plaintiff or some person in his behalf, but it does not, in affirmative and explicit terms, provide that it shall be made to appear in the affidavit, either by way of recital or in such a manner as to be sworn to, that the affiant makes the affidavit in behalf of the plaintiff.

It will be observed here, that the portion of the affidavit in relation to Brinkerhoof being the plaintiff's acting secretary is by way of recital, and is not a portion of the affidavit sworn to. Brinkerhoof does not swear that he makes the affidavit in the plaintiff's behalf, nor does he swear that he is the plaintiff's acting secretary. That he was such secretary is stated by way of recital, and precedes the facts sworn to; and that he made the affidavit in the plaintiff's behalf can only be known, if at all, by inference from the recital that he was its acting secretary. Is that sufficient? In the case of *Abbott v. Zeigler*, 9 Ind. 512, the affidavit was "William H. Mallory, attorney for the plaintiffs, says," etc.

The only question that seems to have been made was, as to whether or not the attorney in the case could make the affidavit. That seems to have been the only question con-

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sidered; and that he could, seems to have been the only question decided. Therefore, the only force of the case is, that the affidavit, made as it was, passed the scrutiny of the court without condemnation, because it was not shown in a different and more positive manner, that Mallory was the plaintiff's attorney, and made the affidavit in the plaintiff's behalf. The case, however, is in harmony with a line of cases which hold that where a statute authorized the affidavit to be made by an agent or attorney of the plaintiff, the fact that the affiant is such agent or attorney may be stated in the affidavit by way of recital, and need not be sworn to, and that the authority of such agent or attorney, and the fact that he acts in behalf of the plaintiff, will be presumed from such recital. *Wetherwax v. Paine*, 2 Mich. 555; *Mandel v. Peet*, 18 Ark. 236. It seems to have been held in this case that these facts need not appear in the affidavit, even by recital.

Other cases hold that if the affidavit in attachment be made by an attorney in the main case, that will be sufficient, without even a recital in the affidavit that he makes it as the attorney of the plaintiff. *Gilkeson v. Knight*, 71 Mo. 403; *Austin v. Latham*, 19 Ia. 88.

On the other hand, it has been held that the court will not assume nor presume that the person making the affidavit is the attorney in the main case, simply because of the same name, and that hence it must appear upon the face of the affidavit that the affiant is the agent, attorney or officer of the plaintiff, either by a recital or by a sworn statement of that fact. *Willis v. Lyman*, 22 Texas, 268; *Wallace v. Byrne*, 17 La. An. 8.

And still further, it is held by the Supreme Court of Wisconsin, under a statute like ours, that a mere recital in the affidavit that the affiant is the agent, attorney or officer of the plaintiff, and makes the affidavit in his behalf, is not sufficient, and that the affidavit must contain a sworn statement that the affiant makes it in behalf of the plaintiff. *Miller v. Chicago, etc., R. W. Co.*, 58 Wis. 310.

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Inasmuch as our statute does not provide that it shall appear by a sworn statement in the affidavit in attachment, that the affiant is the agent, attorney or officer of the plaintiff, and makes the affidavit in his behalf, we have concluded to adopt a middle ground between the extremes, ruled in the above cases, and hold that a recital in the affidavit that the affiant is such agent, attorney or officer is sufficient; and that the affidavit is made in behalf of the plaintiff should be presumed, in the absence of something to the contrary, from the fact that it is made by such agent, attorney or officer. Measured by this rule, the affidavit in this case, denominated an "affidavit in attachment and garnishment," is sufficient. The plaintiff is a corporation. It is recited in the affidavit that the affiant is its secretary. This is sufficient evidence, *prima facie*, that he was its secretary at the time the affidavit was made. And being such secretary, and making the affidavit as such, it will be presumed, in the absence of anything to the contrary, that he made the affidavit in the plaintiff's behalf.

It follows from the conclusions we have reached, that the learned judge below erred in setting aside and quashing the writ of attachment. The judgment is, therefore, reversed, at appellees' costs, and the cause is remanded, with instructions to the court below to overrule the motion to set aside and quash the writ of attachment, and to proceed with the case in accordance with this opinion.

Filed Nov. 3, 1885.

No. 12,270.

BURK, EXECUTOR, v. TAYLOR.

PLEADING.—*Motion to Strike Out will not Perform Office of Demurrer.*—Where the matter alleged is pertinent, and the pleading is not a sham, it is error to sustain a motion to strike out an answer for the alleged want

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Burk, Executor, v. Taylor.

of facts to constitute a defence to the action. Such motion will not perform the office of a demurrer.

From the Fayette Circuit Court.

J. I. Little, R. Conner and H. L. Frost, for appellant.

B. F. Claypool, J. H. Claypool, L. W. Florea and G. C. Florea, for appellee.

HOWK, J.—This case is now before us for the second time. When it was first here, the opinion and judgment of this court are reported, under the title of *Taylor v. Burk*, 91 Ind. 252. When the cause was remanded to the court below for a new trial, the parties appeared and some additional pleadings were filed in the cause, and rulings were made thereon by the court. Afterwards, the cause, being at issue, was tried by the court, and a finding was made for the appellee Mary A. Taylor, and against the appellant Burk, as executor of the estate of Benjamin P. Hegerman, deceased; that, after the final settlement of such decedent's estate, there remained in the hands of appellant, as executor, a balance of \$1,469, which the appellee was entitled to as the sole legatee of the decedent, under his last will. Over appellant's motion for a new trial, the court ordered and adjudged that appellant should pay to the clerk of such court, for the use of the appellee as such sole legatee of the decedent, the aforesaid balance and the costs of this proceeding; and that, upon appellant's full compliance with such order and judgment, the decedent's estate should stand closed and settled, and he should be fully and finally discharged from further liability on account of his trust.

The only error complained of, in argument, on behalf of the appellant, is the decision of the court in sustaining appellee's motion to strike out his answer, filed below on the 6th day of March, 1884. Under this error, the only question discussed by counsel is, whether or not the answer in question stated facts sufficient to constitute a good defence. It is unnecessary for us to consider or decide this question,

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because, whether the answer be good or bad, it is certain that the trial court erred in sustaining appellee's motion to strike out such answer. It is settled by the decisions of this court that a motion to strike out will not perform the office of a demurrer for the want of sufficient facts. What was said by this court, upon the question under consideration, in *Port v. Williams*, 6 Ind. 219, may well be said of the answer, in the case now before us: "Whether it was a sufficient defence to bar the action was wholly immaterial. It was, at least, such pertinent matter as the court ought not to strike out on motion. It was not so irrelevant as to warrant that; it was not a sham defence. * * We are therefore of opinion that the court erred in sustaining the motion to strike out." To the same effect are the following cases: *Clark v. Jeffersonville, etc., R. R. Co.*, 44 Ind. 248; *Indianapolis, etc., Co. v. Caven*, 53 Ind. 258; *City of Elkhart v. Simonton*, 71 Ind. 7.

The judgment is reversed with costs, and the cause is remanded with instructions to overrule appellee's motion to strike out, and for further proceeding.

Filed Oct. 31, 1885.

No. 11,913.

EICHELBERGER v. THE OLD NATIONAL BANK.

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PROMISSORY NOTE.—Action by Endorsee.—Complaint.—Copy of Endorsement.

—It is necessary in a complaint against the endorser of a promissory note, upon the endorsement, to set out a copy of the endorsement, but not necessary where the action is against the maker.

SAME.—Averment of Title.—The plaintiff may show title in himself by an averment that the note was endorsed to him.

SAME.—Sufficiency of Endorsement.—Defect of Parties.—Assignment of Errors.—Practice.—If an endorsement is not sufficient, the question must be presented by demurrer for defect of parties; it can not be raised by an attack upon the complaint in the assignment of errors.

SAME.—Bona fide Holder not Affected by Notice to Endorser.—Where the holder of a promissory note payable in bank acquires it in good faith, for value,

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before maturity and without notice, his rights are not affected by notice to his endorser of a defence thereto.

SAME.—*Fraud.—Burden of Proof.*—Where the maker of a promissory note shows that it was obtained from him by fraud, the burden is upon the party seeking to enforce its payment to show that he acquired it for value, before maturity and without notice.

SAME.—*Signing Note in Blank.*—Where one signs a note in blank, leaving the principal debtor to fill in the amount that may be found due the payee on a settlement, the amount justly due the latter, although greater than represented, may be inserted without fraud.

SUPREME COURT.—*Weight of Evidence.—Practice.*—A judgment will not be reversed upon conflicting evidence.

From the Jay Circuit Court.

T. Bosworth and O. H. Adair, for appellant.

D. T. Taylor, J. M. Smith and T. Bailey, for appellee.

ELLIOTT, J.—The appellant argues that the appellee's complaint is bad, for the reason that it does not set out a copy of the endorsement to the appellee of the promissory notes sued on.

The argument proceeds upon an assumption that can not be maintained. It is not true, as assumed, that a plaintiff who sues the maker of a promissory note is bound to set out a copy of the endorsement to him. This is necessary where the action is against the endorser upon the endorsement, but it is not necessary where the action is against the maker.

It is essential that the plaintiff in an action upon a promissory note should show title in himself, but this he may well do, without setting out a copy of the endorsement, by an averment that the note was endorsed to him. *Hill v. Shalter*, 73 Ind. 459; *Cooper v. Drouillard*, 5 Blackf. 152.

If an assignment or endorsement is not sufficient, the question must be presented by demurrer, assigning for cause a defect of parties; it can not be presented by an attack upon the complaint in the assignment of errors. *Hill v. Shalter, supra*; *Reed v. Garr*, 59 Ind. 299.

The promissory notes upon which the complaint is founded were payable in bank, and are, therefore, commercial paper,

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protected in the hands of a *bona fide* endorsee. It is immaterial whether the immediate endorser of the *bona fide* holder did or did not have notice of the maker's defence, for, if the holder acquired them for value, in good faith, before maturity and without notice, his rights are not affected by the notice to his endorser.

Where the maker of a promissory note shows that it was obtained from him by fraud, it devolves upon the party seeking to enforce its payment to show that he paid value for it, took it before maturity, and without notice of the maker's defence. *Harbison v. Bank, etc.*, 28 Ind. 133; *Zook v. Simonson*, 72 Ind. 83; *Baldwin v. Fagan*, 83 Ind. 447; *Mitchell v. Tomlinson*, 91 Ind. 167; *Hinkley v. Fourth Nat'l Bank*, 77 Ind. 475.

We think the evidence does not affirmatively show that the plaintiff purchased the note for value, before maturity and without notice.

While we think the evidence fails to show affirmatively that the appellee acquired the note for value, before maturity and without notice, we can not reverse the judgment; for we can not hold that the finding of the trial court was not right on the evidence. We have carefully read the evidence, and are satisfied that it fails to show that any fraud was practised upon the appellant. He entrusted the notes signed in blank to the principals, and knew that they were to be filled with whatever amount was found due the payees on settlement. It may be true that the principal debtors represented to him that the amount would not exceed five hundred dollars; but, granting this, still, neither they nor the payee would be guilty of fraud in inserting the amount justly due. But we need not pursue the investigation upon this point, for it has been many times decided that where there is a conflict of evidence the court will respect the judgment of the trial court, and act upon the evidence which that court deemed credible. *Arnold v. Wilt*, 86 Ind. 367; *Giles v. Canary*, 99 Ind. 116; *Pitcher v. Dove*, 99 Ind. 175, p. 176; *Union School Tp. v. First Nat'l*

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Bank, 102 Ind. 464. Acting upon this principle we must hold that the judgment can not be reversed upon the evidence.

Judgment affirmed.

Filed Oct. 31, 1885.

No. 11,904.

FOLTZ v. WERT ET AL.

JUDGMENT.—*Rights of Assignee.*—The assignee of a judgment takes merely the rights held by his assignor.

SAME.—*Lien of, Subject to Prior Equities.*—The general lien of a judgment creditor upon the lands of his debtor is subject to all equities existing against such lands, in favor of third persons, at the time of the recovery of the judgment.

SAME.—*Will be Restricted to Actual Interest of Judgment Debtor.*—Courts of chancery will restrict the lien of a judgment to the actual interest of the judgment debtor, so as to protect the rights of those having prior equities in the property or its proceeds.

CONTRACT.—*Presumption that Parties Entering Into are Adults.*—When nothing appears to the contrary, it will be presumed that persons entering into an agreement are adults, and competent to contract.

PARTITION.—*Will. — Advancements. — Contract. — Lien. — Trust. — Statute of Frauds. — Review of Judgment.*—A testator devised all of his real and personal property to his wife for life, and at her death what remained was to be divided equally between his children. While acting as executrix of the will, the widow, in consideration of an oral agreement between herself and such children, that the amount received by each should be charged against his share in the final partition of the real estate, surrendered the personal estate to the children, each receiving a portion differing in amount from that received by the others. This distribution was reported to and approved by the court. After the death of the widow there was partition accordingly. On a complaint by the assignee of a judgment against one of the sons, for a review of the judgment in the partition proceeding,

Held, that it was competent for the mother and children to agree to the distribution so made.

Held, also, that, under the agreement, the sum received by each child will be regarded in equity as an advancement.

Held, also, that the agreement was not the creation of a lien upon or the declaration of a trust in the real estate.

Held, also, that the rights of the others in the common estate could not be

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impaired by liens acquired on the interest of one without their consent, nor could they be deprived of any right incident to partition.

Held, also, that the agreement having been so far executed as that the personal property was distributed under it, it is too late for the plaintiff to interpose the statute of frauds, even if the agreement were within its terms.

JUDICIAL SALE.—Inchoate Interest of Wife.—Remainder.—Under sections 2483 and 2508, R. S. 1881, when a judicial sale is made of any land in which the husband has a heritable interest, the inchoate one-third of the wife, where the judgment does not bar her rights, vests and becomes absolute in her. A remainder in fee is such an interest.

From the Marion Superior Court.

R. B. Duncan, J. S. Duncan, C. W. Smith and J. R. Wilson, for appellant.

R. N. Lamb and S. M. Shepard, for appellees.

MITCHELL, C. J.—The foundation of the proceedings exhibited in the record before us is a complaint to review the proceedings and judgment of the Marion Superior Court in a partition suit. This complaint embraces the record of the partition suit, consisting of the complaint, answer, replies, decree and motion for a new trial and rulings thereon, and alleges, under various specifications, that error of law is apparent on the face of the record and proceedings.

A demurrer was sustained to the complaint for review, and, refusing to amend, judgment was given against the appellant.

The record of the partition suit discloses that, upon issues made, the court found that the allegations of the complaint therein filed were true, and upon facts found partition was decreed, and the rights of the parties adjusted substantially as set forth in and according to the prayer of the complaint.

Whether the ruling on the complaint for review is maintainable or not, depends in the main upon whether the facts stated in the petition for partition warrant the decree which was made to rest upon it.

The complaint for partition alleges that Joseph Wert died testate, on the 3d day of June, 1872, leaving as his legatees his widow, Rebecca A. Wert, and four children, John W.,

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Edwin A., Frank A., and Benjamin C. Wert; the will is made the basis of the rights of the plaintiffs in the proceeding for partition and is set out in the complaint. The first and second clauses are as follows: "Item 1. To my beloved wife, Rebecca Ann Wert, I devise and bequeath all my property, real and personal (after my just debts are paid), to have and to hold the same for the term of her natural life. Item 2. At the death of my said wife, it is my will that all my real estate and personal property remaining shall be divided equally between my children, with this proviso, however, that until the youngest of said children shall be of age, the others shall have no power to sell or dispose of the said property; and it is my will that none of the real estate which I may own at the time of my death shall be sold, nor any money then at interest be withdrawn or encroached upon in any manner, unless in case of strict necessity, all other means having first been exhausted." Item 3 names the wife as executrix.

It is averred that the testator died seized of certain real and personal property, and that after his death certain other real estate was purchased by the consent of those interested, with funds belonging to the estate. It is further averred that the personal estate, consisting of notes, stocks and money, amounted to about \$15,000.

It appears that after the death of the testator, and while his widow was acting as executrix of his will, she advanced to the sons from time to time moneys derived from the personal estate, notes, stocks, bonds, etc., the use of which was bequeathed to her during her lifetime. These advancements were made under an agreement, mutually entered into between the mother and sons, to the effect that an account should be kept of the moneys and notes distributed to each, and that in the final partition and distribution of the estate, the amounts received by each should be charged against his share, so that the shares should in that manner be equalized in the end. It appeared that the money and notes received by the four sons

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under this arrangement amounted in the aggregate to \$16,454. Of this, John W. had received \$6,843.17; Frank A., \$4,792.01; Edwin A., \$1,927.20, and Benjamin C., \$2,891.31. After this agreement, and the distribution under it, were made, the mother resigned her trust as executrix, and on the 15th day of September, 1876, Jesse Jones was appointed administrator *de bonis non*. On the 4th day of January, 1879, he made his final report as such and was discharged. In this report and account, the distribution above mentioned was exhibited to the court, and the agreement under which it was made was substantially recited.

The mother and sons respectively signed a writing attached to and filed with the report, in which they consented to the settlement report, and referred to the agreement therein recited, ratifying and confirming it. The report and settlement were approved, and the administrator discharged.

It was averred in the complaint that John W. Wert had used the moneys advanced to him in business, became insolvent, and had been adjudged a bankrupt; that, on the 5th day of December, 1877, long after the money was advanced, and the agreement above referred to made, Fletcher & Churchman recovered a judgment against him, and afterwards, on November 29th, 1879, sold his interest in the land described to satisfy an execution issued on their judgment, for \$1,737.01; that they became the purchasers at the sheriff's sale, and received a certificate of purchase which they afterwards sold and assigned to Jones & Foltz who, it is alleged, had notice of the agreement and distribution above referred to. It is also averred that the assignee in bankruptcy, as such assignee, sold the interest of John W. Wert in the lands of which partition was asked, to Jones & Foltz in 1879.

The complaint contained the further averment that Lillian E. Wert, wife of John W., never joined in any conveyance or encumbrance of his interest in the lands, and that, by reason of the foregoing sales, she had become entitled to an undivided one-twelfth part in value of his interest.

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The mother died April 1st, 1879, and the suit for partition was commenced the following December by Edwin A., Frank A., Benjamin C. and Lillian E. Wert, against Jesse Jones and Howard Foltz. Fletcher & Churchman are also named as defendants.

The prayer of the petition was that the several amounts received by the parties interested should be taken into the account and their shares equalized according to the terms of the agreement, and that the interest of Lillian E., wife of John W., should be protected.

Foltz answered to the merits; the other defendants disclaimed any interest.

At the final hearing, it was agreed that the real estate was not susceptible of partition. A commissioner was appointed accordingly, with directions to sell and distribute the proceeds according to the rights of the parties as fixed by the decree.

It was adjudged, that from the interest held by Foltz in the right of John W. there should be deducted the sum received by him under the agreement mentioned, with interest from the 4th day of January, 1879, amounting to \$7,436.47, and the balance paid over to Foltz; that one-twelfth part of the net proceeds of the sale should be paid to Lillian E. for her interest as the wife of John W. Wert.

The controversy is between Foltz, who claims the share of John W. without diminution on account of the advancements, and the brothers and wife of John W., who claim that the advancements made to him should be taken into the account and charged against his share according to the agreement, and that the rights of his wife should be protected, under section 2508, R. S. 1881.

Foltz, having taken the assignment of the Fletcher & Churchman certificate with notice of the agreement between the widow and sons of the testator, and of the advancements made under it, can claim no right superior to, or different from, the rights of his assignors. To the extent that the judgment in favor of Fletcher & Churchman became a lien on

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the interest of John W., that lien or interest was transferred to him. The rights acquired by him were the same as those through whom he acquired them.

It is well settled, "that the general lien of a judgment creditor, upon the lands of his debtor, is subject to all equities which existed against such lands in favor of third persons, at the time of the recovery of the judgment." Courts of chancery will so control the legal lien of the judgment as to restrict it to the actual interest of the judgment debtor in the property, so as to protect the rights of those who have a prior equitable interest in such property or its proceeds. *Hays v. Reger*, 102 Ind. 524; *Armstrong v. Fearnaw*, 67 Ind. 429; *Wharton v. Wilson*, 60 Ind. 591; *Huffman v. Copeland*, 86 Ind. 224; *Monticello Hydraulic Co. v. Loughry*, 72 Ind. 562; *Jones v. Rhoads*, 74 Ind. 510.

If, then, the lien of Fletcher & Churchman's judgment bound only the actual interest which John W. Wert had in the common estate at the time the judgment was taken, and if the appellant stands in the shoes of the judgment creditors, it results that whatever equities the appellees could have asserted against John W. Wert, they may now assert against the appellant, whose rights are of no higher degree. This is not seriously disputed.

It is contended that the distribution or advancements made by the widow were contrary to the provisions of the will, which directed that the real and personal property should be divided at her death, and that none of the real estate should be sold, nor the moneys withdrawn from interest or encroached upon, unless in case of necessity, until the youngest child should become of age. Section 1190, R. S. 1881, which provides that the court shall not order or affirm partition of any real estate contrary to the intention of the testator as expressed in his will, is also referred to as an obstacle in the way of enforcing the agreement.

As the partition suit was not commenced until after the death of the widow, and as it does not appear but that the

youngest child had attained full age before the distribution and agreement were made, it is not perceived that either the statute above referred to or the will exerts any influence on the question. When nothing appears to the contrary, persons entering into an agreement will be presumed to be adults and competent to contract.

It is insisted next that the arrangement between the widow and sons was an attempt to create a lien upon John W. Wert's interest, in the nature of a mortgage by parol, or an attempt to create a parol trust. The proposition that this can not be done is maintained upon authority.

We think, however, that neither the principles nor authorities invoked are in that respect applicable to the case in hand. The testator's sons had a common interest in the real and personal property devised under the will. Their mother had an unqualified right to the use of the whole during her lifetime. Being *sui juris*, it was competent for the mother and sons to agree to the distribution of the personal estate before the death of the mother, and there was nothing to prevent them from agreeing that the amount turned over to each in advance of the time when, by the terms of the will, they would have been entitled to receive it, should be treated as an advancement, and equalized in the final partition of the estate.

To all intents and purposes money or property, thus delivered to the sons by the mother, was so much advanced to them out of property, the use of which she might have continued to enjoy during her lifetime. Without any agreement we think the sums so received would have been treated as advancements, but whether advancements within the contemplation of section 1189, R. S. 1881, we need not inquire. It is beyond question that under the agreement referred to they should be so regarded in equity.

The primary purpose of the testator was to make ample provision for his widow during her lifetime, and to effect an equal division of his real and personal property between his

sons at her death. The widow, to aid her sons, surrendered her right to the personal estate upon the consideration that the sums received by each should be treated as advancements, and the shares equalized in the final partition of the real estate. This agreement accomplished the purpose of the testator substantially, was mutually beneficial to the sons, and was capable of being specifically enforced, after it was so far executed as that the mother had surrendered, and the sons received, the personal property under it.

It was not necessary that the agreement should have been in writing in order that it might be equitably enforced. The agreement was not the creation of a lien upon or the declaration of a trust in land. The rights of the parties arose *ex æquo et bono*, upon the distribution or advancements made under it. Each tenant in common was seized of the land *per my et per tout*. Each had the right to hold the title until all equities relating to the tenancy were adjusted. The enforcement of the rights of co-tenants arising out of the property in which they have a common interest, bears a close resemblance to the enforcement of rights between partners. Freeman Cotenancy and Part., section 269.

Although an equitable lien in a proper case might arise by parol, it is not necessary to determine that question in this case.

The title of the several cotenants could not be divested or severed by proceedings in partition except upon equitable terms. Until their equities under the agreement were adjusted, each held the title to the whole as security for its performance, and thus no necessity existed for creating a lien in the nature of a mortgage by parol, or declaring a parol trust. *McCaslin v. State, ex rel.*, 44 Ind. 151; *Huffman v. Cauble*, 86 Ind. 591; *Felton v. Smith*, 84 Ind. 485; 3 Pomeroy Eq. Jur., section 1239, *et passim*.

The rights of one cotenant in the common estate can not be impaired by liens acquired on the interest of the other without his consent. His rights are superior to the rights of

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the lien-holder, and he can not be deprived of any right incident to the partition. *McCandless' Appeal*, 98 Pa. St. 489.

As the appellant stands in no better attitude than the judgment debtor, and as against him the moneys received from his mother would have been treated as an advancement, as it was agreed they should be, we can perceive no equitable ground upon which he can successfully oppose the decree in partition. *Johnson v. Hoyle*, 3 Head, 56; *Wharton v. Wilson*, *supra*; *Monticello Hydraulic Co. v. Loughry*, *supra*.

Even if the agreement were one which was void at the time it was made, it has been so far executed as that the personal property was distributed under it. This distribution was reported to the court in writing, and it, and the agreement under which it was made, ratified by the written assent of all interested in it, having been executed so far by the parties concerned, it is not in the power of one occupying the position of the appellant to interpose the statute of frauds now, even though it had happened that the agreement was within its terms. *Savage v. Lee*, 101 Ind. 514; *Hays v. Reger*, *supra*; *Dixon v. Duke*, 85 Ind. 434; *Morrison v. Collier*, 79 Ind. 417.

The point is also made that the court erred in awarding to Lillian E., wife of John W. Wert, one-third of the share to which her husband would have been entitled. The argument is that under section 2491, R. S. 1881, a wife is entitled to one-third of all the real estate of which her husband was seized in fee simple during marriage, in the conveyance of which she had not joined, and that as John W. Wert had but an estate in remainder in the lands sold under the Fletcher & Churchman judgment, his wife had no inchoate interest which became absolute under section 2508.

We think this position untenable. The estate of John W. Wert, although not to be enjoyed until after the estate of the life tenant terminated, was nevertheless a fee simple, capable of descending to his heirs.

While it is true, that by the common law a wife was not

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entitled to dower out of an estate in remainder, expectant on an estate of freehold, for want of actual seizin in the husband, it is not believed that the strict rule of the common law is applicable under the statutes in force here. The subject of dower was involved in much complex and abstruse learning at common law, much of which as applied to our system is obsolete.

In the enactment of the statute abolishing dower, and substituting in its place an estate in fee simple, it was the manifest policy of the Legislature to make more liberal provision for the wife. We think the interest which the wife of John W. Wert took in the lands in question must be determined by a consideration of sections 2483 and 2508, R. S. 1881.

Under section 2483, one-third of all the lands in which a husband has, at the time of his death, a heritable interest, subject to certain provisions in favor of creditors, depending upon its value, descends in fee simple to the widow.

Under section 2508, where lands of the husband, in which the wife has an inchoate interest, are sold at judicial sale, her rights not having been barred by the judgment, the inchoate interest of the wife vests, and becomes absolute precisely as in the case of his death. Section 2491 determines the estate of a widow in the lands of which her husband "may have been seized in fee simple at any time during the marriage, and in the conveyance of which she may not have joined, in due form of law." This section has no application to lands of which the husband dies the owner.

If John W. Wert had died on the 29th day of November, 1879, the day on which the lands were sold on execution, no doubt could be entertained, but that the one-third of the real estate in question would have descended to his widow under section 2483. Under section 2508, the land having been sold at judicial sale, she took an absolute estate in one-third, exactly as she would have, in case her husband had died.

Moreover, it is disclosed in the record, that the life ten-

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ant died April 1st, 1879, and that the sale on execution was not made until November 29th, 1879. This was after the seizin of the remainder-man became perfect both in *deed* and in *law*. Whatever application the rule contended for might have under other circumstances, it can have none here.

We have considered the question relating to the subject of interest computed on the sums distributed, and are of opinion that no error was committed in that regard which should subject the judgment to review.

We find no error in the ruling of the superior court, and its judgment is accordingly affirmed, with costs.

Filed Oct. 28, 1885.

No. 12,053.

GORTEMILLER v. ROSENGARN ET AL.

MECHANIC'S LIEN.—*Religious Society.*—*Contract.*—*Foreclosure.*—*Complaint.*—

A complaint against the trustees of a religious society to foreclose a mechanic's lien for work and labor done and materials furnished, which charges that the services performed by the plaintiff were rendered under the order and at the request of the society assembled as a congregation, with the knowledge and implied consent of the defendants, is sufficient to create an obligation upon the society as an organization, and, therefore, sufficient against its trustees.

SAME.—*Knowledge of Contractor that Society Relies on Voluntary Contributions to Pay for Improvement.*—A majority of the members of a religious society, including its trustees, believing that the necessary funds could be raised by voluntary contributions, voted to have improvements made to its church building, and appointed a committee to make a contract for and superintend the work; G., with knowledge that voluntary contributions were relied on to pay for the same, undertook to do the work for a certain sum, relying upon obtaining his pay through the agency of the society. No other arrangement was made for paying G. for his services. *Held*, that G., having performed the work, became entitled to enforce a lien upon the building.

From the Ripley Circuit Court.

S. M. Jones, for appellant.

J. G. Berkshire and *J. L. Benham*, for appellees.

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NIBLACK, J.—The complaint in this case charged that the German Evangelist Lutheran St. Paul's Church, a religious society, located at Olean in Ripley county, in this State, had, in March, 1883, a membership comprising about one hundred and fifty persons; that during that month the members of that religious society, when assembled as a congregation, resolved by a majority vote that a cupola and other improvements should be placed upon, and certain repairs made, to the church edifice in which they were accustomed to worship; that the trustees of said society, to wit, George Rosengarn, Frederick Steyer, Herman Fisse, Montz Lommatzoch and Ernest Hunger, were present when the congregation voted to have said improvements and repairs made; that the congregation thereupon appointed a committee to contract for and superintend the making of such improvements and repairs; that the said Herman Fisse was made a member of that committee and all the other committeemen were members of the congregation which appointed them; that the committee contracted with the plaintiff to make such improvements and repairs and agreed to pay him \$200 for making the same, to be paid as soon as the work was completed; that the plaintiff made the improvements and repairs in question according to the terms of his contract with the committee, a bill of the particulars of which was filed with the complaint, and completed the same on the 28th day of April, 1883; that, on the 8th day of May, 1883, the plaintiff filed in the recorder's office of Ripley county, a motion in writing of his intention to hold a lien upon the church edifice, for said sum of \$200, which remained due and unpaid, for the work and labor performed and materials furnished in making the improvements and repairs above stated upon the same; that said notice of lien, a copy of which was also filed with the complaint, was duly recorded in the proper record book of said recorder's office on the day on which it was so filed. The trustees were made defendants to the action, and a judg-

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ment for \$225 and a foreclosure of the alleged lien were demanded.

A demurrer to the complaint being first overruled, the defendants answered in three paragraphs :

First. That at a meeting of the congregation in February, 1883, it was agreed that the improvements and repairs described in the complaint might be made if the same should be paid for by voluntary contribution, but it was then and there further agreed and understood that neither the society nor its trustees should be responsible for the expense which might thereby accrue ; that all that was asked by such trustees was that permission to do so might be given to such members as might desire to make the proposed improvements and repairs at their own expense, of all which the plaintiff had notice when he entered into the contract for such improvements and repairs, he being a member of the congregation at the time permission was given to have the work done, and also a member of the committee on improvements and repairs when it was first appointed ; that the committee accepted the plaintiff's proposition to do the work desired on the church edifice, upon the condition that it should have one year in which to raise the money necessary to pay for such work and in which to pay for it ; that the plaintiff ought, therefore, to look to the committee, and not to the defendants, as trustees for the congregation, for his compensation.

Secondly. In general denial.

Thirdly. Payment.

The circuit court held the first paragraph of the answer to be sufficient upon demurrer, and the plaintiff replied to the first and third paragraphs :

First. In denial.

Secondly. Special matter in avoidance.

A demurrer was sustained to the second paragraph of the reply, and a jury returned a general verdict in favor of the plaintiff for \$167.50, with answers to some special interrogatories. The circuit court held that these answers to inter-

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rogatories were inconsistent with the general verdict, and rendered judgment upon such answers for the defendants.

Complaint is made of the decision of the circuit court in overruling the demurrer to the first paragraph of the answer, and of some subsequent decisions adverse to the plaintiff. Cross error is assigned upon the overruling of the demurrer to the complaint.

The complaint charged, in effect, that the services performed by the appellee were rendered under the order, and at the request, of the society assembled as a congregation, with the knowledge and implied consent of the defendants as its trustees. This was enough to create an implied obligation upon the society as an organization, and hence sufficient as against its trustees.

The first paragraph of the answer was evidently designed to be what is usually denominated an answer in confession and avoidance of the plaintiff's demand. It inferentially admitted that the services charged for by the plaintiff had been performed by the leave and consent of the society; that the trustees participated in asking permission of the society that the proposed improvements and repairs might be made upon certain conditions; that the amount demanded had never been paid, and that a notice of the plaintiff's intention to hold a lien for his services had been filed and recorded as averred in the complaint. In avoidance, however, it was alleged that the permission that the improvements and repairs might be made was given by the congregation upon the condition that they were to be paid for by voluntary contributions from such members as might be inclined to contribute for that purpose, and not otherwise, and that one year's time was allowed to the building committee in which to raise money in that way and make payment for such improvements and repairs.

As regards the matters set up in avoidance, it may be noted that there was no averment that anything had been paid by voluntary contribution, or that any one had bound himself

to pay any sum of money in that way, or had become individually responsible to the plaintiff for the services he had performed. Neither was it averred that a year had not expired from the time of the letting of the contract to the plaintiff, when this action was commenced. The fair interpretation of the entire transaction, as charged in the complaint, and as described by the admissions and averments of the paragraph of answer under consideration, appears to us to have been that a majority of the congregation, including its trustees, believing and trusting that the necessary funds could be raised by voluntary contribution, voted to have certain improvements and repairs made to its church edifice, and appointed a committee to make a contract for and superintend the work, and that the plaintiff, with knowledge that voluntary contributions were relied upon to pay for the same, undertook to make the desired improvements and repairs, relying upon his chances of obtaining his stipulated compensation in some way through the agency of the society which owned the building; that as the work done by the plaintiff resulted to the advantage of the society exclusively, and as no other binding arrangement was made for his compensation, the plaintiff became entitled to retain and enforce a lien upon the building upon which the improvements and repairs were made. Any other interpretation would leave the plaintiff without any remedy, and render so much of the contract as related to his compensation meaningless and inoperative, since voluntary contributions can not be enforced by law.

Our conclusion is that the circuit court erred in overruling the demurrer to the first paragraph of the answer, and that for that error the judgment ought to be reversed.

The judgment is reversed, with costs, and the cause remanded for further proceedings.

Filed Oct. 27, 1885.

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No. 12,406.

THOMAS v. THE STATE.

CRIMINAL LAW.—*Sending Obscene Letter.*—"Paper" Includes Letter.—The word "paper," as used in section 1997, R. S. 1881, prescribing the offence of sending lewd and obscene matter by mail, or otherwise, includes letters.

SAME.—*Affidavit and Information.*—*Setting Out Letter.*—*Omission of Part.*—An affidavit and information charging the sending of a lewd and obscene letter is not bad because, in setting out the letter, a few words are omitted, if the omission is explained by alleging that the words were illegible.

SAME.—*Copying Paper in Hæc Verba.*—*Quære*, whether, under section 1751, R. S. 1881, it is necessary in a prosecution of this character to set out the obscene paper in *hæc verba*?

SAME.—*Evidence.*—*Handwriting.*—In the absence of direct evidence of the sending of the letter, proof that it and the address upon the envelope are in the handwriting of the accused is proper.

SAME.—*Knowledge of Handwriting by Correspondence.*—*Production of Letters.*—One, by correspondence with another, may become so well acquainted with the latter's handwriting as to be competent to testify as to the genuineness of a writing claimed to be his; and to show the qualification of such witness the letters received by him in the course of the correspondence may be produced and identified.

SAME.—*Corroborative Evidence.*—As corroborative of such witness the genuineness of the signature to a letter received by him in such correspondence may be testified to by another.

SAME.—*Refreshing Memory of Handwriting by Reference to Other Papers.*—A witness who is shown to be acquainted with another's handwriting may, before or at the trial, refer to papers in his possession which he knows to be in the handwriting of the other, to refresh his memory before testifying.

SAME.—*Guilty Knowledge.*—For the purpose of showing guilty knowledge on the part of the accused, another letter of similar character, shown to be in his handwriting, received by the same person in like manner, is competent evidence.

SAME.—*Harmless Variance.*—*Practice.*—Immaterial and harmless variances between the original letter as read in evidence, and the copy set out in the affidavit and information, are not, in a case of this kind, available for the reversal of the judgment.

SAME.—*Defendant as Witness.*—*Cross-Examination.*—Where the defendant goes upon the stand as a witness in his own behalf, and denies the offence charged against him, he may be cross-examined upon all facts relevant and material to that issue.

SAME.—*Expert Witness.*—*Comparison of Handwriting.*—*Testing Accuracy of*

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|------|-----|
| 108 | 419 |
| 194 | 408 |
| 108 | 419 |
| 141 | 686 |
| 142 | 78 |
| 103 | 419 |
| 144 | 636 |
| 144 | 643 |
| 147 | 55 |
| 108 | 419 |
| 1157 | 59 |
| 157 | 60 |
| 157 | 61 |
| 157 | 62 |

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Expert.—To test the accuracy of an expert witness, who gives an opinion as to handwriting upon a comparison of a genuine with the disputed writing, he may be asked on cross-examination whether the latter and another writing not admitted to be genuine are in the same handwriting.

From the Fayette Circuit Court.

T. D. Evans and *D. W. McKee*, for appellant.

F. T. Hord, Attorney General, *L. H. Stanford*, Prosecuting Attorney, and *W. B. Hord*, for the State.

ZOLLARS, J.—Section 1997, R. S. 1881, is as follows: “Whoever deposits in any post-office in this State, or places in charge of any person to be carried or conveyed, any lewd, obscene, indecent, or lascivious book, paper, pamphlet, drawing, lithograph, engraving, picture, daguerreotype, photograph, stereoscopic picture, model, cast, instrument or article of indecent or immoral use, or instrument or article for procuring abortion or for self-pollution, or medicine for procuring abortion or preventing conception, or any circular, hand-bill, card, advertisement, book, pamphlet, or notice of any kind; or gives oral information, stating when, where, how, or of whom such articles or things or any of them can be purchased or otherwise obtained; or knowingly receives the same or any of them, with intent to carry or convey the same; or knowingly carries or conveys the same, except in the United States mail,—shall be fined not more than five hundred dollars nor less than five dollars, to which may be added imprisonment in the county jail not more than six months nor less than ten days.”

Upon an affidavit and information, charging appellant with having violated this statute, in sending a lewd and obscene letter to a young girl, he was convicted and fined \$5. From this judgment he prosecutes this appeal.

Under proper motions below, and assignment of errors here, appellant assails the affidavit and information. The first contention is, that the mailing and sending of a letter, however lewd and obscene it may be, do not fall within the

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terms of the above statute, and that hence the affidavit and information do not charge an offence known to the law. The ground of this contention is, that the word *paper* is the only word in the statute upon which any plausible argument to the contrary might be predicated, and that, under the well settled canons of construction, as applicable to criminal statutes, that word can not be made to include letters from one person to another.

It is undoubtedly the rule that criminal statutes should receive a strict construction, but it is also the rule, as stated by Judge DRUMMOND in the case of *United States v. Gaylord*, 17 Fed. Rep. 438, that it must be a reasonable construction, in reaching which must be considered the object the Legislature had in view in the words used. The plain and manifest object of the Legislature in the enactment of the above section, and the sections of the statute preceding and following, was to guard and protect the public morals, by erecting barriers which the evil-minded, lewd, and lascivious may not safely pass.

The moral worth of every community rests with the family. It is the source from which comes the ever-flowing current that brings with it lessons of probity and chastity. With that fountain head corrupted, decay and overthrow will surely follow. It is there that the youth are taught that honesty and virtue are above price. It is there that the young girls, in the innocence and purity of their youth, are nurtured and guarded against the wiles and intrigues of the wicked and the seducer. If they may be approached and insulted upon the streets with impunity by the vile and depraved, or if the same class may, with impunity, override the barrier that protects the home, and reach the young girls sheltered there, through the public mails, by letters sent to them, which teach or attempt to teach them that voluptuousness is more to be desired than true womanhood, and that virtue had better be exchanged for sexual dissipation, then, indeed, there is a crying necessity for further legislation. We

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should be loath to come to the conclusion that the laws are thus defective. It is our duty, however, not to make, but to declare the statute law as we receive it from the hands of the Legislature. And did we feel that there is reasonable ground for doubt as to whether the above statute covers the offence here charged, we should do our duty and solve that doubt in favor of the accused.

After a careful examination and consideration, we are convinced that the word "paper," as used in the statute, was intended to, and by a fair construction does, cover a case like this. To give to the word "paper" its primary signification would be to destroy it, so far as concerns this statute. Primarily, the word "paper" means a substance used for writing and printing on.

Such a substance, of course, could neither be lewd, obscene, lascivious nor indecent. The word as used in the statute has reference, not to the material, but to what may be upon it. Shall it be said, then, that the matter upon the paper must be printed matter, or that the paper must be what is commonly known as a newspaper, or an illustrated paper? The statute gives no definition to the word "paper." Neither does it provide that the paper must be a newspaper, or an illustrated paper. So far as any definition is afforded by the statute, there is just as much authority for saying that the paper must be a written paper as that it must be a newspaper, or any other kind of printed paper. There is just as much authority for saying that the matter must be impressed upon the paper by a type-writer, as that the paper shall be an illustrated paper. Clearly, we must look beyond the statute for a definition of the word "paper," and must give to it such a definition as the Legislature evidently intended it should have in the connection in which it is used, and thus carry out the intent of that body in the enactment of the law. The word "paper," in its ordinary signification, may mean either a written or printed paper. It is a usual thing to speak of a person having written or read a paper upon some subject.

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That paper, as read, may be either in his own handwriting, or it may be by a type-writer, or in print; but it is still his paper, and means the same thing. And so it is usual to speak of a man's outstanding paper, in the way of notes, bills, or other obligations. They may consist partly of writing and partly of print, or entirely of one or the other, and yet they are his paper.

The word "paper" is very frequently used in the Revised Statutes of 1881. Thus, the court may compel parties to produce any paper. Section 480. The clerk must endorse upon papers the date of the filing. Section 483. He gets a fee for filing each paper, and for a copy thereof. Sections 5854, 5859. The auditor is required to file papers. Section 5908. It is made a crime to alter, secrete, take away, or steal any paper. Sections 1937, 1939. Other sections use the word "paper" in a like sense. These sections, of course, refer to what are known as court papers, and usually such papers are written papers, but they are not always written, nor need they be. Frequently, they are printed, and more frequently the type-writer is used. However that may be, they are still papers.

Worcester gives as one of the definitions of paper, "Any written paper or instrument; a writing;" and, further, "A printed sheet." One of Webster's definitions is, "A printed or written instrument; a document, essay, or the like; a writing."

In the case of *State v. Jones*, 36 Am. Dec. 257, it was held that no material variance exists between an indictment for forgery and the proof adduced in support of it, where the indictment described the forged instrument as a paper writing, and the proof showed it to have been partly printed and partly written. The court said: "An instrument signed by a party is, in legal parlance, the paper writing of such a party. It is his signature to it which gives it that character, and not the body of the instrument. In a declaration on a note of hand, it is described as a note in writing, although every word

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except the signature may be in print. So of a bond partly written and partly printed, it is said to be 'the writing obligatory' of the party executing it."

In the case of *United States v. Gaylord*, *supra*, Judge DRUMMOND said: "'Paper' is a word of extensive meaning. It may comprehend anything that has on it what is obscene, lewd, or lascivious." These authorities fully support our conclusion, that the word "paper" in our statute has reference to the written or printed matter, and that the matter may be either written or printed. The case last above cited arose under section 3893, R. S. U. S., which makes it unlawful to send through the mails any obscene, lewd or lascivious book, pamphlet, picture, paper, writing, print or other publication of an indecent character. The inhibitions in that statute thus far, it will be observed, are the same as in our statute, except the word "writing." And while the case was made to turn upon that word, we think that the decision and reasoning of the court are authority in support of a holding that the word "paper" in our statute includes a letter. In that case, the indictment charged the defendant with having mailed a lewd, obscene and lascivious letter. The point was made by the defendant, that the indictment did not charge an offence, because, in the statement of the inhibited articles in the statute, the word "letter" is not used, and for the reason that the writing must be something in the nature of a publication. The court said: "A letter is certainly a writing. If addressed by one person to another, while we may call it a letter, it is also a writing, whether the characters are made with a pen, or by type, or in any other similar manner. A very common practice in writing letters at the present day is the use of the 'type-writer,' as it is termed. That would certainly be a writing, although the letters and words are marked by a machine upon the paper; and so if the words were printed with a pen, instead of being made in a running or flowing hand. The mere fact that they were not written with a pen and ink of the ordinary kind would not

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prevent it from being a letter; neither would any of these forms prevent it from being a writing, within the meaning of the statute."

As we have seen, one of the usual definitions of the word "paper" is "a writing." Worcester defines a writing to mean anything written, a written paper of any kind. If, then, the word "paper" is the equivalent of "a writing," and a writing under the United States statute includes letters, it would seem to follow as a logical conclusion, that the word "paper" in our statute includes letters. That the word "paper," as used in our statute, does include letters, is, we think, the reasonable interpretation to put upon the statute. Such an interpretation is not in violation of, but in harmony with, the usual definition of the terms therein used. That it is in harmony with the spirit and purpose of the statute, there can be no doubt. The limited construction contended for by appellant would, in a large measure, thwart the main object of the statute. If the sending of one obscene, lewd, and lascivious letter is not an offence under the statute, of course, the sending of a hundred or many hundreds of such would not be. Under the process of manifolding, many such letters could be sent out without a very great increase of labor. And so, such letters might be printed and sent out in sealed envelopes as private communications. They would be none the less letters, because printed, and thus these obscene, lewd and lascivious communications might be sent broadcast over the State, into the homes and to the youth, and the law, intended to prevent the use of such corrupting agencies, would become, practically, a dead letter.

Another objection urged is, that the affidavit and information do not set out the letter *in hæc verba*. After the averment that appellant mailed a lewd, obscene, indecent and lascivious paper and letter, the affidavit and information proceed as follows: "Which said paper and letter then and there was and is of the following substance, purport, tenor and effect, and of which the following words and figures, except as herein

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otherwise stated and explained, is substantially a true copy, to wit."

Here the letter is set out in full, with the omission of a few words that were illegible; then follows this: "That in the original of said paper and letter in the writing, subject and context thereof, at the point and place therein indicated and pointed out and exhibited by the asterisks or stars included in brackets, in the foregoing copy, there is one line of writing, of about six words, dimmed and erased, caused by the folding and wear, to such an extent that the same is undecipherable, and the original wording thereof is wholly lost and unknown to this deponent, and, therefore, the true purport and effect of such part can not be given or set out. Said paper and letter on the envelope thereof, then and there being, was by said Joseph A. Thomas, immediately prior to placing and depositing thereof as aforesaid, subscribed and addressed as follows."

It will be noticed that in the portion preceding the copy, apparently contradictory terms are used. The word "purport," it has been held, means the substance of an instrument as it appears on the face of it to every eye that reads it. The word "tenor" means an exact copy of an instrument. *Fogg v. State*, 9 Yerger (Tenn.) 392; *Myers v. State*, 101 Ind. 379; *State v. Atkins*, 5 Blackf. 458.

"Substantially a true copy," does not mean a full and exact copy, but rather a copy of the material and essential parts, or an abstract of them. We have, then, in the use of the word "tenor," an averment that the copy of the letter set out is a full and exact copy, and in the words "substantially a true copy," it may be said, an averment that the copy as set out is a copy of the material or essential parts of the letter. But we think, that taking the copy as we find it set out, with all of the averments in relation to it, it sufficiently appears that it is a true and full copy, except the illegible portion, for the failure to set out which there is a sufficient excuse given. The words "substantially a true copy," in the connection and

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manner in which they are used, evidently refer to the copy as complete so far as it goes, but not an exact, full and complete copy, because of the omission of the illegible portion. This is made apparent by what follows the copy. These following averments fully support the preceding averment that the letter (except the omitted portion) is set out according to its tenor, which means that the copy is an exact one.

It may well be doubted, whether, under section 1751, R. S. 1881, it is necessary, in a case like this, to set out the letter *in hæc verba*. About that, however, we express no opinion here.

It has been many times held, and it seems to be now the general American doctrine, that in a case like this the obscene book or paper need not be set out in the indictment, if it be properly described, and the indictment contains the averments, that it is so obscene that it would be offensive to the court, and improper to be placed on the records thereof, and that, therefore, the grand jury did not set it forth in the indictment. *Commonwealth v. Holmes*, 17 Mass. 336; *Commonwealth v. Sharpless*, 2 S. & R. 91; *State v. Brown*, 27 Vt. 619; *United States v. Bennett*, 16 Blatchf. 338; *McNair v. People*, 89 Ill. 441; 1 Bishop Crim. Proc., section 496; 2 Bishop Crim. Proc., section 709; Bishop Directions and Forms, section 623.

The ground of the ruling, as given in one of the Massachusetts cases, is, that to require the obscene matter to be set out would be to require that the public itself should give permanency and notoriety to indecency, in order to punish it. In this case, however, the indecent matter is set out, and we must deal with the case as it comes before us, and indicate nothing as to whether or not the rule of the above cases may be applied in this State.

Twenty-six assigned causes for a new trial call in question the rulings of the trial court in the admission of testimony. One May Stewart was allowed to testify that she had carried on a correspondence with appellant, and received ten letters

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from him, all of which she produced and identified. For convenience, the prosecuting attorney seems to have numbered these from 1 to 10. To some of these, as indicated by the evidence, the name of appellant is signed in full. Others, it appears, were signed as that set out in the information, "A Friend," and others again, by his initials. They were received at different times, near the time when Miss McQuinney received those directed to her, upon one of which this prosecution is based. In answer to questions as to when she became acquainted with appellant, May Stewart was allowed to testify that she had no personal acquaintance with him until after she had received the first four or five letters. To these letters, as we infer from the evidence, his name was not signed in full. Miss McQuinney received two letters, which the State claims were sent to her through the post-office by appellant. These were numbered, and referred to upon the trial as numbers "11 and 12." "No. 12" is the one set out in the information. The witness May Stewart was allowed to testify that, through and by her correspondence with appellant, she was acquainted with his handwriting, and that letters numbered 11 and 12 were written by him. All of the testimony by this witness was objected to by appellant, and sternly resisted, upon the grounds, among others, that it related to collateral matters, would tend to create an impression in the minds of the jury that appellant had been guilty of other improprieties and crimes similar to that charged in the information, and thereby create a prejudice against him, and was intended to afford the means of comparison of handwritings.

The gravamen of the offence, under the above section of the statute, is the sending through the mails, or otherwise, of lewd, obscene or lascivious papers, etc. It is not material under that section, whether the writing be by the sender or by some one else. Did appellant send the letter? That is the question for decision. He denied having sent it, and put the State to proof. Direct evidence seems to have been

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wanting. No one saw him mail it. The next best proof was that which the State attempted to make, and that was, that the letter and the address upon the envelope were in his handwriting. That proof became very important and material, and if made, would be sufficient to justify a conviction, unless overthrown by appellant. It is well settled, that a person may, by and through a correspondence with another, become so well acquainted with his handwriting as to be competent to testify as to the genuineness of a writing claimed to be his. Abbott Trial Ev. 393; Roscoe Crim. Ev. 174-5; 1 Greenl. Ev., section 577; *Rogers v. Ritter*, 12 Wall. 317.

A party producing a witness to testify to the genuineness of a handwriting, not only has the right to, but is under the necessity of first showing his qualification. The State, therefore, clearly had the right to establish the competency of the witness Stewart, by showing that she had carried on a correspondence with appellant, and to show the extent of that correspondence and her personal acquaintance with him. That the personal acquaintance did not antedate all of the letters received by her, can make no difference. The jury were not and could not have been influenced by the contents of these letters, because they were not read in evidence. For aught that appears, there was nothing improper in them. And then, too, the court instructed the jury that the evidence of the witness Stewart should only be considered by them upon the question of handwriting.

Her evidence was sufficient to establish her competency to testify, and hence her testimony that letter "No. 12" is in the handwriting of appellant, was properly admitted. And so, too, her testimony that letter "No. 11" is in the handwriting of appellant was properly admitted, if that letter itself was competent evidence for any purpose, a question we shall hereafter consider.

May Stewart testified, that by and through her correspondence with appellant, she was acquainted with his handwriting, and able to state that letters "No. 11" and "No. 12"

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were in his handwriting. Such evidence is not regarded as being based upon a comparison of handwritings, but upon an acquaintance with, and knowledge of, the handwriting.

Following the testimony of the witness Kennedy, showing that he was acquainted with appellant's handwriting, the prosecuting attorney handed to him letter "No. 6," received by May Stewart, and interrogated him as to the signature thereto. The witness answered that it was the genuine signature of appellant. It was objected again that this letter was not connected with the case; that testimony in relation thereto would raise a collateral issue, and that the purpose was to get the benefit of a comparison of handwritings. If such was the purpose of the testimony, it is not shown by the record. If the evidence was competent for any purpose, there was no error in admitting it over the objections stated. We think that it was competent in corroboration of the witness Stewart. Proving the signature to the letter to be appellant's, tended to prove that appellant wrote the letter, and thus in some degree corroborated the statement of the witness Stewart, that she received the letter in a correspondence with appellant. This no more raised a side issue than did her testimony in relation to the correspondence; and that testimony, we have seen, was competent, as showing her qualification to judge of and testify concerning the handwriting in letter "No. 12," received by Miss McQuinney, and set out in the information.

The witnesses Stivers and Kennedy, in answer to questions by the prosecuting attorney, were allowed to state that letter "No. 11," received by Miss McQuinney, is in the handwriting of appellant.

These witnesses were both acquainted with the handwriting of appellant. Their testimony was based upon that knowledge, and not upon any comparison of handwritings. Their testimony was clearly competent and relevant, if letter "No. 11" is in any way connected with the case and competent testimony. As before said, that question will be hereafter noticed.

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Another question is made upon a part of Kennedy's testimony upon re-examination by the prosecuting attorney. On that re-examination, the witness testified that his recollection of the handwriting of appellant had been refreshed by an examination of a paper in his possession, written by appellant, some four or six months prior to the trial.

The question raised upon this evidence can avail appellant nothing, for the following reasons:

First. Appellant first asked the witness about having refreshed his recollection.

Second. The witness was allowed to answer upon the re-examination without objection.

Third. A witness who shows himself to be acquainted with another's handwriting may, before or at the trial, refer to papers in his possession which he knows to be in the handwriting of the other, to refresh his memory before testifying. *Abbott Trial Ev.* 395; *Redford v. Peggy*, 6 Rand. (Va.) 316; *Smith v. Walton*, 8 Gill (Md.) 77; *McNair v. Commonwealth*, 26 Pa. St. 388.

We come now to letter "No. 11," and the alleged error in allowing it, and the envelope in which it was received, to be read in evidence, observing that the evidence as to the handwriting upon the envelope was shown to be appellant's, by the same evidence that was adduced to show that the letter was in his handwriting. This letter, as we have seen, was addressed to, and received by, Miss McQuinney, to whom and by whom letter "No. 12" was addressed and received.

The evidence is sufficient, in the absence of something to the contrary, to show that this letter "No. 11," and the address upon the envelope, are in appellant's handwriting. This being established, the question remains, were the letter and the address upon the envelope competent evidence for any purpose? Appellant concedes that this letter is lewd and obscene, and argues that, because it is so, the sending of it was a crime under the statute for which appellant might be pun-

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ished, if he wrote and sent it, and that, therefore, it should not have been admitted and read in evidence.

The rule is, that the evidence must be relevant to the issues in the case. And it is well settled that a defendant ought not to, and can not, be convicted of the offence charged simply because he has been guilty of another offence. And hence, evidence of a distinct and separate offence is not admissible to prove that the defendant committed the offence charged. But there are cases where evidence of other like offences, committed by the defendant, is relevant and competent in the case on trial. The admissibility of such evidence in such cases is, in a sense, an exception to the general rule. In such case, the evidence is not to be excluded simply because it may show that the defendant had been guilty of other offences. It is said in *Roscoe Crim. Ev.* 90: "The notion that it is in itself an objection to the admission of evidence that it discloses other offences, especially where they are the subject of indictment, * * * is now exploded. * * * If the evidence is admissible on general grounds, it can not be resisted on this ground."

It will not be necessary here to cite or go into an examination of the many cases which establish, or seem to establish, exceptions to the general rule. It is sufficient for the purposes of this case, that there are two well settled exceptions, and these are where an intent or guilty knowledge is an element of the offence charged. *Bersch v. State*, 13 Ind. 434; *Robinson v. State*, 66 Ind. 331; *Harding v. State*, 54 Ind. 359; *Lovell v. State*, 12 Ind. 18; *Doolittle v. State*, 93 Ind. 272; *Strong v. State*, 86 Ind. 208 (44 Am. R. 292); *Koerner v. State*, 98 Ind. 7; see, also, *State v. Markins*, 95 Ind. 464 (48 Am. R. 733).

Thus, if a party is charged with knowingly making, holding or passing forged paper, it is competent to show that shortly before or shortly after the event charged, he had held or uttered similar forged instruments to an extent which makes it improbable that he should have been ignorant of the forgery.

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McCartney v. State, 3 Ind. 353; Wharton Crim. Ev., sections 34, 39, and cases there cited; *State v. McAllister*, 24 Maine, 139; *Commonwealth v. Stearns*, 10 Met. 256; *Wash v. Commonwealth*, 16 Grat. 530; *Mason v. State*, 42 Ala. 532; *Heard v. State*, 9 Texas Ap. 1; *Steele v. People*, 45 Ill. 152.

And so it is said, that guilty knowledge being the gist of the offence of receiving stolen goods, receptions about the same time of other goods of a similar character stolen by the same person or persons, connected with him, may be put in evidence on the trial of an alleged receiver. Wharton Crim. Ev., section 44, and cases there cited; *State v. Ward*, 49 Conn. 429; *Kilrow v. Commonwealth*, 89 Pa. St. 480; *Yarborough v. State*, 41 Ala. 405; *Devoto v. Commonwealth*, 3 Met. (Ky.) 417.

In the case of *Bottomley v. United States*, 1 Story, 135, that eminent judge said: "In all cases where the guilt of the party depends upon the intent, purpose, or design with which the act is done, or upon his guilty knowledge thereof, I understand it to be a general rule, that collateral facts may be examined into, in which he bore a part, for the purpose of establishing such guilty intent, design, purpose, or knowledge. * * * * In short, wherever the intent or guilty knowledge of a party is a material ingredient in the issue of a case, these collateral facts," that is, other acts and declarations of a similar character, "tending to establish such intent or knowledge, are proper evidence." And so it has been held, that on a charge of sending a threatening letter, prior and subsequent letters from the prisoner to the party threatened, may be shown in evidence as explanatory of the meaning and intent of the particular letter on which the prosecution is based. Wharton Crim. Ev. (9th ed.), section 46 n.; *Rex v. Robinson*, 2 Leach C. C. 869.

As we have seen, the charge in the case before us is, that appellant knowingly, etc., placed the lewd and obscene letter in the post-office. The statute, in defining the offence, does

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not use the word "knowingly," nor the word "intentionally;" but, evidently, in order to make out the offence, it was necessary for the State to prove guilty knowledge on the part of appellant. It can not be conceded that if some other person had written the letter, put it in an envelope directed to Miss McQuinney, and so placed it with appellant's mail that he deposited it in the post-office without notice or knowledge, he would have been guilty of the offence charged. To so hold would be to turn an innocent oversight into a crime. This the statute was not intended to do. It is to punish the wicked and guilty, and not those who have neither knowledge of, nor intention in, the act. If, then, guilty knowledge is an ingredient of the offence, it was necessary to in some way prove that guilty knowledge. It may be said that the jury would have the right to infer the guilty knowledge from the proof of the act charged. That is doubtless so, but that does not render other proof of that guilty knowledge incompetent. When a fact is to be proven, the law requires the best evidence attainable, but it does not put a limit upon the amount of proof that may be adduced. When we have reached the conclusion that guilty knowledge is necessary to make out the offence, we bring the case within the rule established by the above cited authorities. Under that rule we think that letter "No. 11," and the address upon the envelope, were competent and relevant evidence, if not for the purpose of showing that appellant deposited letter "No. 12" in the post-office, for the purpose of showing, or tending to show, that if he did deposit it he did so with a guilty knowledge.

Objection was made below to the introduction in evidence of letter "No. 12." The ground of the objection was, that there is a variance between it and the copy set out in the information. The burden of the letter is to convince Miss McQuinney that she should seek the opportunity, and have sexual intercourse with a man. The writer pretends to be a woman, and to give the advice as such. In relation to young girls, and Miss McQuinney as one of the class, and in rela-

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tion to following the suggestions in the letter, and disregarding the counsels of the mother to the contrary, there occurs in the copy of the letter as set out in the information the following, between which and the letter in evidence, it is claimed, there is a fatal variance, viz.: Copy. "She should do what nature formed her, as she is, for, that is, to have intercourse," etc. The letter in evidence omits the word "to" before the word "have." Copy. "As my mother advised me so much to always avoid such things." The letter in evidence has the word "had" before the word "advised." Copy. "They will advise you to pay no attention to this, although they know it is right." The letter in evidence has the word "may" before the word "know." Copy. "You have entire control over yourself." The letter in evidence omits the word "entire" before the word "control."

The most that can be said of the addition or omission of the words in the copy is, that the word "to" supplies an ellipsis in the letter; the word "entire" is a qualification of the word "control," and the other words added or omitted affect the modes and tenses of the verbs with which they are used. The sense and purport of the copy is not different from the letter. There are some other instances where nouns and verbs are used in the singular and plural number in the copy, and otherwise in the letter, but these differences are not such as to affect the sense and purport.

The copy, however, as these differences show, is not an exact copy of the letter read in evidence, and the question is whether this difference constitutes such a variance as that the judgment must be overthrown on account of it. Such a variance in a prosecution for forgery would be fatal, under the strict rules applied in such cases. Whart. Crim. Ev., section 114a; *Porter v. State*, 15 Ind. 433; *Zellers v. State*, 7 Ind. 659; *Smith v. State*, 33 Ind. 159; *Sharley v. State*, 54 Ind. 168; *Rooker v. State*, 65 Ind. 86; *Abbott v. State*, 59 Ind. 70; *State v. Pease*, 74 Ind. 263.

The strict rules applied in criminal pleading and practice,

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are a part of our inheritance from the mother country. They came to us from another age, and grew up in a different state of society. Some of them have been greatly modified by statutes in many of the States, and others have been, in some degree, relaxed by the rulings of the courts. The modern tendency, both in legislation and judicial determination, is to relax the severe rigor of those rules, so as to apply them to the changed order of things, and still protect the liberty of the citizen to the fullest extent. In speaking of those strict rules, more especially as applied to criminal pleadings, Mr. Wharton, in his work on Criminal Pleading and Practice, at section 173, says: "The great rigor of the old English law in this respect was one of the consequences of the barbarous severity of the punishment imposed. A more humane system of punishment was followed by a more rational system of pleading."

In keeping with the advancement in this regard, it is enacted in our statutes, that an indictment or information is sufficient, if it can be understood therefrom: "*Fourth.* That the offence charged is clearly set forth in plain and concise language, without unnecessary repetition. *Fifth.* That the offence charged is stated with such a degree of certainty that the court may pronounce judgment, upon a conviction, according to the right of the case." R. S. 1881, section 1755. And so, too, it is provided that "No indictment or information shall be deemed invalid, nor shall the same be set aside or quashed, nor shall the trial, judgment, or other proceeding be stayed, arrested, or in any manner affected, for any of the following defects: * * * *Sixth.* For any surplusage or repugnant allegation, when there is sufficient matter alleged to indicate the crime and person charged. * * * *Eighth.* For omitting to state the time at which the offence was committed in any case in which time is not the essence of the offence; nor for stating the time imperfectly, unless time is of the essence of the offence. * * * *Tenth.* For any other defect or imperfection which does not tend to the prej-

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udice of the substantial rights of the defendant upon the merits." R. S. 1881, section 1756. And so, too, it is provided, that the rules of evidence prescribed in civil cases shall govern in criminal cases. R. S. 1881, section 1796. And, finally, it is provided, that "In the consideration of the questions which are presented upon an appeal, the Supreme Court shall not regard technical errors or defects or exceptions to any decision or action of the court below, which did not, in the opinion of the Supreme Court, prejudice the substantial rights of the defendant." Sec. 1891, R. S. 1881. See *Myers v. State*, 101 Ind. 379; *O'Connor v. State*, 97 Ind. 104; *Dukes v. State*, 11 Ind. 557; *Stout v. State*, 96 Ind. 407; *State v. Sammons*, 95 Ind. 22.

The case before us is based upon a recent statute creating a new offence, and this is the first case under that statute that has reached this court. Keeping in view the nature of the case and the spirit of the criminal code, we are not inclined to extend, and apply to it, the strict rules applied in forgery and like cases, but rather the liberal rules prescribed by the above cited statutes. Here, as we have seen, the gravamen of the offence is not the writing of the lewd and obscene letter, but the depositing of it in the post-office. The letter in evidence is, in sense, meaning and purpose, the same as the copy set out in the information. By its introduction in evidence, appellant could by no possibility have been taken by surprise or injured. The ruling of the court, therefore, in admitting the letter in evidence, was such as could by no possibility prejudice the substantial rights of appellant. And whether it was technically wrong or not, it was such a technicality as this court should disregard under the above statutes.

We by no means intend to hold that if the variance had been a substantial one, and thus one that might have affected the substantial rights of appellant, it would or could be disregarded. Nor are we to be understood as giving our sanction to a loose and careless practice in such cases. With the exercise of reasonable care in copying instruments into in-

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dictments and informations, the cases of variance that would reach this court would be few. That degree of care ought to be exercised.

When appellant was upon the witness stand, and after he had denied that he had written either letter "No. 12" or the address upon the envelope, and had denied that he mailed the letter, or caused it to be mailed, the prosecuting attorney, on cross-examination, placed in his hands the letters received by May Stewart, and asked him to examine them, and state in whose handwriting they were. To this appellant objected, upon the grounds that they were not papers in the case, and were not referred to in the examination in chief; that a refusal to answer might be to his prejudice with the jury, and that an answer might criminate himself. All of these objections were overruled; he excepted, and, without further stating a cause, refused to answer. He was not compelled to answer. Of course, if he had not become a witness in his own behalf, he could not have been compelled to testify, and such questions could not have been propounded.

It is said in the case of *Commonwealth v. Nichols*, 114 Mass. 285 (19 Am. R. 346): "But if he" (defendant) "puts himself on the stand as a witness in his own behalf, and testifies that he did not commit the crime imputed to him, he thereby waives his constitutional privilege, and renders himself liable to be cross-examined upon all facts relevant and material to that issue, and can not refuse to testify to any facts which would be competent evidence in the case if proved by other witnesses." See, also, cases there cited. *State v. Ober*, 52 N. H. 459 (13 Am. R. 88); *Connors v. People*, 50 N. Y. 240; *Inhabitants, etc., v. Henshaw*, 101 Mass. 193 (3 Am. R. 333); 2 Criminal L. Mag., p. 313.

Whether or not appellant might have been compelled to answer the questions propounded to him, on the ground that it would criminate himself, is a question we need not now decide. However that may be, the prosecutor undoubtedly had the right to cross-examine him upon all facts relevant and mate-

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rial to the issue, and within the scope of a legitimate cross-examination.

When a party voluntarily takes the witness stand, and makes a broad denial of the offence charged, whether that denial be in general or specific terms, much latitude should be allowed in the cross-examination. Here appellant's denial put in issue all of the testimony adduced in support of the State's case. If his testimony was true, all that in favor of the State was either ignorantly or wilfully false, including that of May Stewart. The credibility and weight to be given to her testimony depended upon the letters she claimed to have received from appellant. We think, therefore, that there was no available error in the prosecuting attorney propounding the question to appellant.

But one question remains that needs to be referred to. The witness McIntosh was called by appellant as an expert witness. Appellant had made an affidavit for a change of venue in the case. McIntosh, in behalf of appellant, was allowed to compare the signature to that affidavit with letters "No. 11" and "No. 12," and their envelopes, and to give his opinion as to whether or not the handwriting of all were alike, or by the same person. Upon cross-examination, the prosecuting attorney placed in the hands of the witness letter "No. 6," received by May Stewart, and interrogated him as to whether or not it is in the same handwriting as "No. 12." As a means of testing the accuracy of the witness as an expert, upon cross-examination, we think there was no available error here.

We have given this case a patient and careful examination, and while in some instances the State went, perhaps, to the full limit of the rules of evidence, we are not satisfied that any such error intervened as would justify a reversal of the judgment. The judgment is, therefore, affirmed, with costs.

Filed Oct. 27, 1885.

Lowery v. Howard.

No. 12,603.

LOWERY v. HOWARD.

HABEAS CORPUS.—*Erroneous Judgment.*—*Criminal Law.*—A judgment of conviction by the circuit court, upon a plea of guilty, of murder in the first degree, and the fixing of punishment, without the intervention of a jury, are erroneous, but not void, and can not be attacked collaterally on *habeas corpus*. Section 1119, R. S. 1881.

CRIMINAL LAW.—*Punishment of One Guilty of Murder in First Degree Must be Fixed by Jury.*—*Supreme Court.*—*Appeal.*—*Practice.*—In cases of murder in the first degree, if the court fixes the punishment without the intervention of a jury, it is erroneous, but even when the error is presented on appeal, the Supreme Court can only reverse the judgment, and remand the cause with instructions to submit the question of punishment to the discretion of a jury.

From the Judge of the Clark Circuit Court.

G. H. Voigt and M. Z. Stannard, for appellant.

F. T. Hord, Attorney General, F. B. Burke, Prosecuting Attorney, and W. B. Hord, for appellee.

Howk, J.—On the 12th day of September, 1885, Eli Lowery presented to the Honorable Charles P. Ferguson, judge of the Clark Circuit Court, in vacation, his verified petition or application for the issue of a writ of *habeas corpus*. In such application Lowery alleged that he was restrained of his liberty and illegally confined in the Indiana State Prison South by the appellee, Howard, who was the warden of such prison. Upon the presentation of Lowery's application to him, in the vacation of his court, Judge Ferguson made the following order:

"After duly considering such petition and application, it appearing upon the face thereof that Eli Lowery is in the custody of Andrew J. Howard, as warden of the Indiana State Prison South, by virtue of the final judgment of a court of competent jurisdiction, I do not think, under section 1119, R. S. 1881, I have any power to inquire into the legality of such judgment. In my opinion, the facts stated in the petition do not make a *prima facie* case in favor of the petitioner, so as

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to authorize the issuing of a writ of *habeas corpus* as prayed for. Therefore, I now order that the petitioner's application for a writ of *habeas corpus* be and the same is refused."

Lowery excepted to this order of the judge, and has appealed therefrom to this court, and has here assigned such order as error.

Lowery made a complete record of his conviction of murder in the first degree, and of his sentence to the Indiana State Prison South for and during his natural life, a part of his petition or application for the issue of a writ of *habeas corpus*. It appeared from this record that at the June term, 1876, of the Orange Circuit Court, in this State, an indictment was duly found and returned into open court, charging Lowery, and four other named persons, with the commission of the crime of murder in the first degree, in Orange county; that afterwards, at the same term of such Orange Circuit Court, Eli Lowery appeared in person, in open court, and, having been arraigned on such indictment, for plea thereto said that he was guilty as therein charged; that thereupon, on the same day, and at the same term, the Orange Circuit Court, being sufficiently advised, found that Eli Lowery was guilty of murder in the first degree; and that the Orange Circuit Court then and there adjudged that Eli Lowery was guilty, as charged in the indictment, of murder in the first degree, and assessed his punishment at imprisonment in the State's prison at Jeffersonville, Indiana, for and during his natural life.

After setting out this record in his petition or application, Eli Lowery alleged that the action of the Orange Circuit Court, in finding him guilty and assessing his punishment as aforesaid without the intervention of a jury, and all subsequent proceedings in such cause, were erroneous, illegal and void, as he was thereby deprived of his constitutional right to a trial by a jury; and that his restraint and confinement in such prison were illegal.

In section 1119, R. S. 1881, it is provided as follows: "No court or judge shall inquire into the legality of any judgment

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or process whereby the party is in his custody, or discharge him when the term of commitment has not expired, in either of the cases following: * * * * * *Second.* Upon any process issued on any final judgment of a court of competent jurisdiction."

We need not argue for the purpose of showing that the Orange Circuit Court was "a court of competent jurisdiction." It had exclusive original jurisdiction of the crime charged against Eli Lowery, and of his person upon that charge. The proceedings and judgment of the Orange Circuit Court against Eli Lowery, after he had interposed his plea of guilty, were not void, therefore, but were merely erroneous.

In *Church on Habeas Corpus*, section 372, it is said: "The writ of *habeas corpus* can not be used as a writ of error. Mere error in the judgment or proceedings, under and by virtue of which a party is imprisoned, constitutes no ground for the issuance of the writ, and it is well settled by both the State and Federal courts that a judgment or sentence can not be assailed on *habeas corpus*, if it is merely erroneous, the court having given a wrong judgment when it had jurisdiction of the person and subject-matter. Thus, where one was convicted of assault with intent to kill, and was sentenced to confinement in the penitentiary at hard labor, when such an offence was not punishable by confinement in the penitentiary, it was simply an error not relievable on *habeas corpus*, and the remedy was appeal." *Ex Parte Siebold*, 100 U. S. 371; *People, ex rel., v. Liscomb*, 60 N. Y. 559 (19 Am. R. 211); *Ex Parte Bond*, 30 Am. R. 20. In this court it has been uniformly held that a judgment, however erroneous it may be, unless it be absolutely void, can not be assailed in a collateral suit or proceeding by a party to such judgment. *Reid v. Mitchell*, 93 Ind. 469; *Dowell v. Lahr*, 97 Ind. 146; *Rogers v. Beauchamp*, 102 Ind. 33.

In *Ex Parte Watkins*, 3 Pet. 193, which was a petition for the writ of *habeas corpus*, Chief Justice MARSHALL said:

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"An imprisonment under a judgment can not be unlawful, unless that judgment be an absolute nullity; and it is not a nullity, if the court has general jurisdiction of the subject, although it should be erroneous."

The Orange Circuit Court had, as we have seen, jurisdiction of the subject-matter and of the person of Lowery when it rendered the judgment against him, under which he is imprisoned. That court erred, we think, when Lowery interposed his plea of guilty, in not calling a jury to say, in their discretion, whether he should suffer the penalty of death or be imprisoned during life; but that error of the court did not render its judgment void. Therefore, the judgment can not be assailed collaterally on *habeas corpus*. *State, ex rel., v. Murdock*, 86 Ind. 124.

Lowery's counsel rely for the reversal of Judge Ferguson's order upon the recent decision of this court in *Wartner v. State*, 102 Ind. 51. That was a direct appeal from the judgment of conviction, affixing the death penalty, and can have but little application to a case of collateral attack. In the case cited the court said: "After the appellant's plea of guilty, the proceedings and judgment of the court are erroneous, and errors of so grave a character that he has the right to insist upon them here as affording substantial grounds for the reversal of the judgment." For these errors it was there held upon appeal that the judgment must be reversed and set aside.

For more than thirty years the law of this State has provided that one who is found guilty of murder in the first degree shall either suffer the extreme penalty of death, or be imprisoned in the State's prison during life, in the discretion of the jury trying the cause. In all those years no such discretion has ever been given to the trial court, if such a thing were possible under our present Constitution. It was error, therefore, in the Orange Circuit Court to exercise the discretion which our law confers upon the jury, and not upon the court, and to assess Lowery's punishment at imprisonment in

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the State's prison during his natural life. But it is difficult to see upon what ground Lowery could claim, if he values his natural life, that he was in any wise harmed by the erroneous action of the Orange Circuit Court, of which he complains. Upon his plea of guilty the law required that he should suffer one or the other of two punishments, and of these two the court assessed against him what is generally considered as the milder punishment. Even if his case were before us upon an appeal from the judgment of the Orange Circuit Court, we could do no more (if we did so much) than to reverse the judgment and remand the cause, with instructions to submit the question of his punishment, upon his plea of guilty, to the discretion of a jury.

The order of the judge, in vacation, is affirmed, with costs.
Filed Oct. 30, 1885.

No. 12,124.

MCGEE v. THE STATE, EX REL. AXTELL.

OFFICE AND OFFICER.—*Mandate to Compel Predecessor to Surrender Records.*—*Eligibility.*—*Pleading.*—Mandamus is the proper remedy to compel a retiring officer to turn over to his successor the records and furniture pertaining to the office, and it is not necessary to allege in the application that such successor is eligible to the office, as is the case in *quo warranto* to try title.

SAME.—*Resignation.*—*Acceptance.*—*Title to Office.*—Where, without notice of the withdrawal of a resignation previously made, the time arrives for it to take effect, and a successor to the incumbent is duly appointed, no formal acceptance of such resignation is necessary to deprive such incumbent of title to the office.

SAME.—*Regularity of Appointment.*—*Refusal to Surrender Records.*—One can not contest the regularity of the appointment of a successor, who has become invested with an apparent title, by refusing to surrender the records of the office.

SAME.—*County Superintendent.*—*Appointment of.*—Without regard to whether the votes of a majority of all the school trustees are necessary to the valid appointment of a county superintendent of schools, where such trustees recognize the appointment as valid and the appointee qualifies

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and enters upon the duties of the office with the acquiescence of all others, the latter may compel his predecessor by mandamus to deliver to him the records of the office.

SUPREME COURT.—*Harmless Error.*—*Practice.*—A harmless error is not available for the reversal of the judgment.

From the Monroe Circuit Court.

J. R. East and *W. H. East*, for appellant.

H. C. Duncan, for appellee.

MITCHELL, C. J.—Axtell applied to the circuit court of Monroe county for a mandate to compel McGee to deliver to him the books, papers and furniture pertaining to the office of county superintendent of schools.

It was stated in the application that McGee had been duly elected to the office of county superintendent, in June, 1883, and that after continuing therein until November 21st, 1884, he tendered his resignation to take effect on the ensuing 26th day of November; that the school trustees, having been duly assembled on that day, appointed the relator to fill the unexpired term of McGee, and that he qualified and entered upon the discharge of the duties of the office.

He averred a demand upon his predecessor, and a refusal to deliver the books, papers and furniture pertaining to the office, and that his duties could not be performed efficiently without such records and furniture. The application was duly verified.

An alternative writ was ordered, and, on the day following, after filing a motion to quash the writ and a demurrer to the application, both of which the court overruled, the defendant filed an answer in three paragraphs. Waiving the points of practice, some of which we think are well taken by the appellee, we proceed to examine the case upon its merits.

It is contended by the appellant that because the application or petition did not allege that Axtell was a citizen of Monroe county, and otherwise eligible to the office of county superintendent, the demurrer to it should have been sustained.

The learned counsel liken this to a proceeding to try the

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title to an office, and his attack upon the complaint, as also his defence, is predicated upon this theory.

This is radically and fundamentally wrong. Where one, claiming title to an office, institutes proceedings by information, in the nature of a *quo warranto*, to oust an incumbent and gain admission himself, he must aver and prove his eligibility. *State, ex rel., v. Bieler*, 87 Ind. 320; *State, ex rel., v. Kilroy*, 86 Ind. 118; *Weir v. State, ex rel.*, 96 Ind. 311.

Proceedings in *quo warranto* may be resorted to, and are aptly designed for the purpose of trying title to, and, in cases of dispute, obtaining possession of an office, and because an adequate remedy is thus afforded, mandamus does not lie for the purpose of gaining possession or settling such title. High Ex. Leg. Rem., section 49, *et passim*.

The application in this case does not proceed upon the theory that there is an existing dispute about the title to or possession of the office. It avers that the appellant resigned, and that the appellee was duly appointed and qualified in his stead to fill his unexpired term, and that he entered upon the duties of the office. This presents no question of conflicting claims. The question presented relates to the refusal of the appellant to turn over the proper records to his successor, the demurrer in effect admitting that the appellee is his successor, and that the appellant's right is at an end. Admitting that he had resigned, and that the appellee was duly appointed as his successor, there was but one thing more required of the appellant, and that was, to turn over to him the records and furniture pertaining to the office. Failing to do this, mandamus was the appropriate remedy. *Johnson v. Smith*, 64 Ind. 275.

After the demurrer was overruled, the appellant answered by a general denial, and by two special answers. The first special answer admits the resignation, but says that at the ensuing meeting of the board of school trustees, a motion was made by one of the members of the board to accept the resignation, and upon such motion six of the twelve mem-

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bers composing such board voted in favor of, and six against accepting it, and that thereupon the motion to accept was withdrawn. The answer concludes with an averment that the defendant "now withdraws his offer to resign said office." This answer, by failing to deny, admits that the appellee was duly appointed as his successor. The offer to the court to withdraw the resignation was ineffectual. The plaintiff's rights could not be defeated or in any wise affected in that manner. The time having arrived at which the resignation duly tendered was to take effect, no withdrawal having meanwhile occurred, and the school trustees having met and appointed a successor, no formal acceptance of the appellant's resignation was necessary.

By the appointment of a successor, the school trustees recognized the fact that a vacancy had occurred. *State, ex rel., v. Hauss*, 43 Ind. 105 (13 Am. R. 384).

The right of the appellant was at an end when the school trustees proceeded, without notice of a withdrawal of the resignation, to treat the office as vacant.

The next special answer assails the regularity of the appellee's appointment. This answer, by failing to deny, also admits that at the time the alleged appointment was made, the appellant had resigned. The appellant, having resigned, and the appellee having been appointed and qualified, and having become thereby invested with an apparent title to the office, it was not competent for the appellant to contest the regularity of his appointment by refusing to surrender the records. *Huntington v. Smith*, 25 Ind. 486.

His right to control the records and furniture was at an end when his resignation became effectual, and this took place when his successor was appointed by the body in which the appointing power was lodged. When it was certified by the proper authority that this body had appointed the appellee, and that in pursuance of such appointment he had qualified, there remained nothing more for the appellant to do except

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to surrender the muniments of the office. *Parmater v. State, ex rel.*, 102 Ind. 90.

This being so, we need not decide whether it was requisite to a valid appointment that the appellee should have received the votes of a majority of all the school trustees, or whether the votes of a plurality constituted a valid appointment. His appointment having been declared and certified to him, and the appointing body having recognized it as valid, and having qualified and entered upon the discharge of the duties of the office, with the acquiescence of all others, he had a right to compel, by the authority invoked, the delivery to him of the records.

There was no error in sustaining the demurrer and exceptions, as they are denominated in this record, to the special answers.

The record shows that the exceptions to the answers embraced, with the others, the general denial. The exception to it was sustained with the others.

These exceptions were made to the answers because, it was averred, they did not state facts sufficient to constitute a return to the alternative writ.

The objection which was specifically alleged against the general denial was, that it was not verified.

Demurrers were also filed to the special answers, and their sufficiency was thus brought in question, as well as by the exceptions filed. The ground of demurrer assigned was, that neither of them stated facts sufficient to constitute a defence to the complaint.

It is apparent that the answers were, therefore, treated in the double capacity of a return to the writ and as answers to the complaint, treating the application for the writ as the complaint. Thus treated, the general denial not verified was held insufficient as a return to the writ, and sufficient as an answer to the complaint.

We are aware of no precedent, nor has our attention been called to any, which justifies the practice pursued in this case.

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The court seems to have regarded the answers as remaining in the record as answers to the complaint, notwithstanding the exceptions which had been taken and sustained to them as a return to the writ.

After sustaining the exceptions to the whole answer as a return to the writ, including that taken to the general denial, the court then sustained a demurrer to the special answers, on the ground that they were not sufficient to constitute a defence to the complaint. This left the general denial apparently in the record as an answer to the complaint. Notwithstanding this, the record then recites that, for want of an answer and return to the writ, the court ordered a peremptory writ to issue, and gave judgment accordingly.

Assuming that the general denial remained as an answer to the complaint, this was error, but no exception was reserved to the action of the court at this point, nor was there any motion to submit the case for trial on the issue thus made. If it is assumed that the court committed error in sustaining an exception to the general denial as a return to the writ, it was at the most a harmless error if it remained as an answer to the complaint, and while we do not approve of the apparently anomalous practice which was pursued, as substantially a right result was reached, we can not for that reason reverse the case.

Judgment affirmed, with costs.

Filed Nov. 3, 1885.

No. 10,810.

THE CITY OF RICHMOND v. DAVIS.

MUNICIPAL CORPORATION.—*Injunction.*—*Taxpayer.*—A taxpayer of a municipal corporation may maintain an action to enjoin the unauthorized expenditure of corporate funds, or the making of an investment that will result in loss to the corporation.

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SAME.—Discretionary Powers.—While corporate officers may be enjoined from wasting corporate funds, they can not be enjoined from exercising a discretionary power as to the time, manner and plan of building structures for corporate purposes.

TRUSTS.—Power to Lease Trust Property.—Trustees possess general power to lease trust property, if the lease does not exceed the quantity of estate vested in them as trustees, and is a reasonable one.

SAME.—Devise to Charitable Uses.—Perpetuities.—A devise for a charitable purpose is in its nature perpetual, and does not come within the provisions of the statute against perpetuities, section 2962, R. S. 1881.

SAME.—Perpetual Leases.—Municipal Corporation.—Order of Court.—Want of Power.—Where trustees of real estate devised in trust for a charitable use executed perpetual leases of such real estate to a municipal corporation for corporate purposes, such leases are not void because of the want of power in the trustees to execute them, nor are they void for the reason that the leases were not ordered or confirmed by the proper court.

SAME.—Action to Set Aside Leases.—It is the general rule that trustees of land devised to a charitable use should only lease for years, unless ordered by the proper court to lease for a longer term; but leases for lives or long periods, though executed without the sanction of the court having the control of the trust, will not be set aside in a collateral attack or at the suit of a stranger, unless they are so clearly unreasonable or detrimental to the beneficiaries that a court will not allow the leases to stand.

SAME.—Equity.—Rights of Lessee.—Equity will protect the rights of lessees who, acting under perpetual leases of real estate devised to charitable uses, have in good faith made permanent improvements, where such leases are set aside on the application of the proper parties.

From the Wayne Circuit Court.

W. D. Foulke, J. L. Rupe and J. H. Kibbey, for appellant.

ELLIOTT, J.—The appellee sues as a taxpayer and citizen of the city of Richmond, and asks that the city officers be enjoined from erecting buildings on land which it claims to have acquired by a lease. The theory upon which the complaint proceeds is, that the city can acquire no rights in the land on which its officers propose to erect the buildings. The nature of the claim of those from whom the title to the land is devised is set forth, and from the allegations of the complaint upon this subject we gather these facts: Ithamar War-

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ner owned the land in 1835, and in that year died testate; in his will he devised the land in controversy to his sister, Sarah Warner, during her life, and remainder in trust for the education of the children of the town of Richmond. In a suit, wherein James R. Mendenhall, James Elder and Joel Vaile, school trustees, were plaintiffs, and the city of Richmond was defendant, the Wayne Circuit Court, in the year 1853, appointed the school trustees Elder, Vaile and Mendenhall trustees under the will, and ordered that the trust should vest in their successors in office. The city appealed to the Supreme Court where the judgment of the circuit court was affirmed. After the rendition of this judgment, the only claim of the city was founded upon leases executed by the school trustees. The invalidity of these leases is thus averred: "And said plaintiff says that the parties who executed the several so-called perpetual leases, under which alone all claim of said city to the title or possession of lot 28, or any part thereof, is derived, had no power or authority to execute the said leases or either of them, and they were never authorized or directed by the court having jurisdiction of the trust to execute said leases, nor were the said leases ever reported to, or ratified or confirmed by the court, and said instruments and each of them are wholly null and void."

A taxpayer of a municipal corporation may maintain an action to enjoin the unauthorized expenditure of corporate funds by the officers of the municipality. This case, so far as concerns the right of a taxpayer to sue, falls within this general principle, for we regard it as clear that corporate officers may be enjoined from making an investment that will surely result in loss to the corporation.

While corporate officers may be enjoined from wasting the funds of the corporation by an investment that will result in a loss of the money invested, they can not be enjoined from exercising a discretionary power as to the time, manner and place of building structures for corporate purposes. Whether this suit can be maintained depends upon the effect to be

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given the complaint. If it shows no more than the exercise of a discretionary power, the suit can not be maintained; if it shows that the officers are about to make an investment that will result in the loss of the money invested, the suit is well brought.

If the person from whom the city claims title could convey none, then it is manifest that the city officers should not be allowed to waste the corporate funds by investing it in the property. The pivotal question, therefore, in the case is, can the city acquire title to the leased property?

The school trustees, by whom the leases were executed, were trustees under the will of Ithamar Warner. This was conclusively settled by the judgment pronounced in 1853, and affirmed by this court in the succeeding year. *Common Council, etc., v. State, ex rel.*, 5 Ind. 334.

Trustees have a general power to lease lands, but the lease must be a reasonable one. Perry Trusts, section 484. An English author says: "Where the length of the term to be granted is not defined by the power, the trustee must be guided by the consideration of what is most beneficial to the trust estate." Hill Trustees, 482. Mr. Taylor says: "Trustees of land, being the owners of the legal estate, may grant leases which can not be impeached, so long as they are justified, by the quantity of the estate they possess." Taylor Landlord and Tenant, section 130.

It appears from these authorities that the law is, that trustees possess general power to lease trust property, and as they do possess this power, their leases, if executed according to law, are valid unless they exceed the quantity of the estate vested in the trustees, or the leases are unreasonable. The leases described in the complaint do not exceed the quantity of the estate vested in the trustees. The trustees succeed in a perpetual line, and their duties are to make the trust estate yield the greatest revenue, and there is nothing in the complaint showing that they have not adopted a course that will produce this result. The presumption is that they have faith-

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fully discharged their duties, and he who would build a right upon a breach of duty must aver facts countervailing this presumption.

The leases under which the city of Richmond derives title are not void because of the want of power of the trustees to execute them, nor are they void for the reason that they were neither ordered nor confirmed by the court. It would have been better to have obtained the order of the court having control of the trust to execute them, but the failure to obtain this order does not render them void. An English author says: "As a general rule, trustees of charities should never alienate the trust estate without the sanction of the court. It does not necessarily follow, that such an alienation will be treated *per se* as a breach of trust." Hill Trustees, 463.

We are without a brief from the appellee, and we can not definitely ascertain upon what ground the court held the complaint good. Our conjecture, however, is that it was for the reason that the leases executed to the parties from whom the title of the city was derived were void, as contravening the statute against perpetuities. That statute provides that "The absolute power of aliening lands shall not be suspended by any limitation or condition whatever, contained in any grant, conveyance, or devise, for a longer period of time than during the existence of a life, or any number of lives in being at the creation of the estate." R. S. 1881, section 2962. It is very doubtful whether this statute applies, in any case, to leases, for its language implies that it was intended to operate only upon the fee, and it is difficult to perceive any reason for extending its terms to leases or mortgages. The language employed, taken in its ordinary signification, seems applicable only to cases where there is an attempt to tie up the fee and circumscribe the power of alienating the land. In leasing land, no obstacle to the alienation of the fee is created. The fee is not tied up, nor is the circulation of that estate interdicted. There is, indeed, no restriction upon the power of the owner of the fee to alienate that estate, for he may

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convey at pleasure, subject only to the rights of the lessee, nor is there any restriction upon the lessee's rights, for he may sublet the demised land or assign his lease. But we need not, and we do not, decide whether this statute prohibits the execution of a lease in ordinary cases for a period beyond that prescribed by the statute, for we need do no more than decide that the statute does not apply to the case of the devise or the lease of land for a charitable purpose.

There is, and has ever been, a difference between ordinary devises and devises made to a charity. The difference is not an artificial one, but is inherent and fundamental. A devise for a charitable purpose is in its nature perpetual and inalienable. An English author, in speaking of conveyances to charitable uses, says: "This, it is obvious, is the characteristic of alienations to charitable uses: it is in the very nature of such dispositions, to withdraw the subject of them from every kind of circulation, since a contrary course defeats their manifest object, viz., the sustentation of the charitable or religious institutions, or the carrying out in continuity of the benevolent purposes and designs, in favor of which they are made." Lewis Perpetuities, 689; 52 Law Library, 438.

In *City of Philadelphia v. Girard's Heirs*, 45 Pa. St. 1, the court, in speaking of a definition of perpetuities, said: "According to this definition, a present gift to a charity is never a perpetuity, though intended to be inalienable." In discussing a devise very similar to that involved here, it was said by the Supreme Court of the United States: "McMicken's direction, in section 32 of his will, that the real estate devised should not be alienated, makes no perpetuity in the sense forbidden by the law, but only a perpetuity allowed by law and equity in the cases of charitable trusts." *Perin v. Carey*, 24 How. 465.

It was said in *Yard's Appeal*, 64 Pa. St. 95, that "It is no valid objection to a grant or devise to a charitable use that it creates a perpetuity, or renders the estate granted or devised for the purpose inalienable."

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The distinction between devises to charitable uses and ordinary devises is recognized in *Detwiller v. Hartman*, 37 N. J. Eq. 347, where the English cases are collected. The decision in the case of *Common Council, etc., v. State, ex rel., supra*, impliedly recognizes this doctrine, although the question as here presented was not there directly argued or decided.

The devise to the charitable use suspended the power of alienation, but, as we have seen, this was a valid devise. The leases executed by the school trustees did not suspend the power of alienating the land, for this power was suspended before the trustees entered upon their duties. The suspension of the power of alienation is contained in the instrument which creates the trust and invests the trustees with the legal estate in the land. That power, therefore, was suspended, not by the act of the trustees, but by the devise which gave them their authority over the property. Their leases did not tie up the land and keep it from circulation, for that was done by the devise. The power of alienation was effectually abridged by the devise, and the leases executed by the trustees have not kept the property from circulation. The leases have not suspended the power of alienation; that was done by the devise long before the leases were executed. These leases can not, therefore, be deemed within the statute, if, indeed, any leases are, for the plain reason that the power of alienation was fettered by the devise which created the trust. It can make no difference whether the property is tied up in the hands of the trustees or their lessees, provided the revenues perpetually go to the charitable use. Whether the land is in the hands of the trustees or of their lessees, can make no difference, for, in either event, the power of alienation is effectually abridged. So far as concerns the general policy and spirit of the law against perpetuities, it can not make a shade of difference whether the land is tied up in the hands of the trustees or their lessees.

It is the general rule that trustees of a charitable use should only lease for years, unless they have obtained the order of

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the court to lease for a longer term. But leases for lives, or for long periods, are not necessarily void for the reason that they were not sanctioned by the court having control of the trust. Mr. Hill says, of the general rule we have stated: "But it by no means follows, that leases granted in opposition to that rule are necessarily invalid as a breach of trust. On the contrary, such leases have frequently been supported under special circumstances. Thus, where it has been the usual custom to lease for lives, or for years determinable on lives, the trustees will be justified in adopting that custom, and in granting leases in that form. But in such cases it seems that the number of lives in the grant ought not to exceed three. Again, where the terms of the lease are fair and reasonable, and for the benefit of the charity, the court, on being satisfied of those facts, has upheld leases granted by trustees for a long term, such as eighty years, or even for so long an absolute term as amounts in fact to an alienation, as 980 or 999 years; and a lease with a covenant for a perpetual renewal has also been sustained on the same ground." Hill Trustees, 463.

There is nothing in the complaint from which it can be inferred that the disposition made of the property was not the one most beneficial to the charity. We can not say from the facts pleaded that a better disposition of the trust estate could have been made, and the action of the trustees should not be virtually set aside upon such a complaint as the present; for, whatever may be the rule where the beneficiaries invoke the aid of the court to overthrow a lease executed by the trustees, here, where a stranger attacks their action, the rule is that the complaint must show that the action of the trustees was so clearly detrimental to the beneficiaries that a court would not allow it to stand. But there is stronger reason for requiring the plaintiff, in a collateral suit like this, to show a plain breach of duty, than there is where a stranger intervenes to protect the trust fund, and that reason is this: The plaintiff's right to sue depends upon his showing that the leases were so clearly

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unreasonable that the court must necessarily annul them. This plaintiff, it is important to keep in mind, is not asking protection for the trust estate, but, in the capacity of a taxpayer, is seeking to enjoin the city from building on the leased land. The theory upon which he proceeds, and it is the only theory that lends the faintest color of plausibility to his claim, is, that the leases are void, and if the city, acting under them, builds on the leased premises, the money expended in building will be lost. His right to sue depends entirely upon the probability of loss to the city. If he does not show that loss will result, he has not even the semblance of a right to maintain the suit.

As the right of the appellee to maintain this action depends upon his showing that loss will result to the municipality, he can not succeed, even though we should decide that the leases were void, unless he also shows that loss will result. It may be conceded that the leases would be set aside upon application of the proper parties, and yet no loss of the city's investment result from the order annulling them. This we affirm for the reason that the court, whenever equity requires it, will protect the rights of the party who, acting under such leases, has in good faith made permanent improvements upon the demised land. *Attorney General v. Baliol College*, 9 Mod. 407; *Attorney General v. Backhouse*, 17 Vesey Ch. 283; *Second Unitarian Society v. Woodbury*, 14 Maine, 281.

There is nothing averred in the complaint which shows that the rule we have stated should not apply to this case.

We hold the complaint bad, and for the reason that the court erred in overruling the demurrer to that pleading, the judgment must be reversed.

Filed Nov. 3, 1885.

 Marshall v. Mathers.

No. 12,055.

MARSHALL v. MATHERS.
 108 458
 120 588

PROMISSORY NOTE.—*Discharge of Surety.*—*Notice to Sue.*—*Pleading.*—To a complaint on a promissory note, an answer by a surety, alleging that after the note became due he notified the plaintiff to institute suit thereon, but failing to allege that the plaintiff did not bring suit as required, and not averring any other fact as a reason for the defendant's release from liability, is bad on demurrer, an averment that the defendant was so released being a mere conclusion of law.

SAME.—*Evidence.*—*Issues.*—Evidence, incidentally given, but not applicable to any issue formed on the pleadings, can not be taken into consideration in determining whether the finding was right upon the evidence.

NEW TRIAL.—*Impeaching and Cumulative Evidence.*—As a general rule, a new trial will not be granted simply to let in newly discovered impeaching evidence; nor will the discovery of merely cumulative evidence be sufficient ground for a new trial.

From the Monroe Circuit Court.

J. H. Loudon and *R. W. Miers*, for appellant.

J. W. Buskirk and *H. C. Duncan*, for appellee.

NIBLACK, J.—Suit by Sallie R. Mathers against Samuel A. Smith, Solomon Green and Robert Marshall upon a promissory note for two hundred dollars, dated October 14th, 1878, and payable five months after date.

Smith was not served with process. Green and Marshall, appearing to the action, demurred to the complaint, but their demurrer was overruled. They then answered:

First. Denying the execution of the note, upon the theory that the instrument sued on had been materially changed after they had signed it.

Second. That they, the said Green and Marshall, had signed the note as sureties for their co-defendant Smith, and not otherwise, which fact was well known to the plaintiff; that one Henry C. Rhorer was the duly authorized and acting agent for the plaintiff, managing and attending to her business, and having special charge of the taking and the collection of the note in suit; that in the year 1879, after the note

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became due, the said Smith, the principal therein, being then about to leave the county of Monroe and State of Indiana, and being then engaged in making arrangements to emigrate to the State of Kansas, they, the said Green and Marshall, notified the plaintiff, and the said Rhorer as her agent, to cause suit to be instituted upon said note; that the plaintiff, and the said Rhorer as such agent, waived the putting of the said notice in writing, and agreed that the verbal notice so given was sufficient, and also agreed to release them, the said Green and Marshall, from any further liability on said note, and did then and there release them from any such liability on the same, and agreed to take said Smith for said note.

A demurrer was sustained to this second paragraph of the answer, and the circuit court, after hearing the evidence, made a finding in favor of Green, and against Marshall, and rendered a separate judgment against the latter for a balance found to be due upon the note.

It is first complained that the demurrer ought to have been sustained to the complaint. There was some informality and uncertainty in the complaint; but we do not regard it as having been fatally defective upon demurrer for alleged substantial insufficiency.

It is next complained that the demurrer was wrongfully sustained to the second paragraph of the answer. This paragraph, as has been seen, failed to aver that the appellee did not bring suit upon the note as she was orally required to do, and did not allege any other fact as a reason for the appellant's release from liability on the note. The averment that the appellant was so released was a mere conclusion of law, when taken in connection with the context. The *facts* averred did not, therefore, constitute a defence to the action. In the case of *Harris v. Brooks*, 21 Pick. 195, cited by counsel, the facts which were held to be sufficient to discharge the surety were distinctly stated. The facts, so far as *facts* were averred in the paragraph before us, do not make a case in all essential respects parallel with that case, nor even analogous

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to it. In that case, the surety offered to take up the note after it became due, but the creditor would not permit him to do so. We have not, consequently, considered whether that case affords a precedent which ought to be followed by this court in a substantially similar case.

It is still further complained that the finding of the circuit court, as against the appellant Marshall, was contrary to the evidence, and that a new trial ought to have been granted for newly discovered evidence.

As applicable to this branch of the case, it may be said, in the first place, that there was evidence tending to establish certain declarations and conduct on the part of the appellee, occurring after the appellant signed the note, which he claims were sufficient to discharge him from liability as surety thereon, and on that ground it is argued that the finding was contrary to the evidence. But this evidence came out rather incidentally, and was not applicable to any issue formed upon the pleadings. It can not, therefore, be taken into consideration in determining whether the finding was right upon the evidence. *Brown v. Will, ante, p. 71.*

It was shown by the evidence that when Smith, the principal, signed the note, it was dated July 5th, 1878, and that the date was afterwards changed to October 14th, 1878. It was also admitted that other alterations were made in the note at or about the time the date was changed. As affecting the appellant's liability upon the note, the important question at the trial became, whether the proven and admitted alterations were made before or after he signed it. As incidental to that question, the precise time at which the appellant signed the note became a subject of inquiry and of conflicting evidence. Rhorer, the appellee's agent, testified to having procured the appellant's signature to the note, and that it was somewhere from one to two weeks after the 14th day of October, 1878, when the appellant signed it, at Bloomington, in this State. The appellant as a witness in his own behalf stated that he left the State of Indiana on the 15th

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day of October, 1878, and remained out of the State for nearly two years. In this respect he was corroborated by other evidence.

It was proposed to prove by one witness, as newly discovered evidence, that Rhorer had made admissions, previous to the trial, inconsistent with his testimony as herein above stated, and by other witnesses facts and circumstances tending to show that Rhorer must have been, and in fact was, mistaken as to the time of the signing of the note by the appellant.

The alleged newly discovered evidence was consequently either impeaching or cumulative. As a general rule a new trial will not be granted simply to let in impeaching evidence, and we see nothing in this case to make it an exception to that general rule. It is, also, a well established rule that the discovery of merely cumulative evidence is not sufficient ground for a new trial. See *Works Ind. Prac.*, sections 922, 923; *Sullivan v. O'Conner*, 77 Ind. 149; *Lefever v. Johnson*, 79 Ind. 554; *Hines v. Driver*, 100 Ind. 315.

The judgment is affirmed, with costs.

Filed Oct. 30, 1885.

No. 12,249.

HERRMAN v. BABCOCK ET AL.

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| 103 | 461 |
| 158 | 540 |

LEASE.—Contract to Sell at Expiration of Term.—Specific Performance.—Mutuality.—Equity.—A complaint by H. alleged that on a certain date B., the defendant, leased to him certain real estate for the term of five years, with the agreement in the lease that B. would sell and convey by warranty deed, and H. should have the right to buy such real estate at the expiration of such lease, the price to be fixed by three appraisers, one to be chosen by each, and the third by the two so chosen; that under such contract H. took possession and in good faith placed valuable improvements on the property which could not be removed without total loss; that at the expiration of such lease H. notified B. of his election to buy such real estate, selected his appraiser, and in all respects was ready to

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comply with the contract on his part, but B. wholly refused to comply with the same. Prayer for specific performance, etc.

Held, that the complaint states a case for equitable relief, and is good on demurrer.

From the Vanderburgh Superior Court.

C. L. Wedding, for appellant.

J. S. Buchanan and *C. Buchanan*, for appellees.

Howk, J.—In this case the appellees separately demurred to the appellant's complaint, upon the ground that it did not state facts sufficient to constitute a cause of action. The demurrers were sustained by the court, and the appellant having failed to amend or plead further, judgment was rendered against him for appellees' costs.

The plaintiff has appealed to this court, and has here assigned as error the decision of the superior court in sustaining the separate demurrer of the appellee Elisha S. Babcock, Jr., to his complaint.

The appellant alleged in his complaint that on the 31st day of July, 1879, the appellee leased to appellant lots numbered 1 and 2, in block No. 146, in that part of the city of Evansville known as Lamasco, Indiana, for the term of five years; that, as part of such lease and contract, it was specially agreed that the appellee would sell and convey by warranty deed, and the appellant should have the right to buy, the above described real estate, at the expiration of such lease, the price to be fixed by three committeemen, one to be chosen by appellees, one by appellant, and a third by the two first chosen, as fully set out in such lease, a copy of which was filed with and made a part of such complaint; that, under such contract, appellant took possession of such real estate, and, relying upon appellee's performing his contract in good faith, had placed during the continuance of such lease houses, mills, machinery and other lasting and valuable improvements on such lots, of the value of \$3,000; and that such improvements can not be removed without becoming a total loss, and

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by his failure to secure such real estate appellant would sustain great and irreparable loss and damage; that at the expiration of such lease, and often since, appellant notified appellee of his election to take such real estate, selected Henry S. Bennett, a competent and disinterested appraiser, and asked appellee to select his appraiser, which appellee then and since had refused to do, or to comply in any manner with his contract; that appellant had been then and since, and still was, ready to carry out such contract and to pay such amount as should be fixed; that appellant had fully kept and performed all the conditions of such lease and contract upon his part, and the appellee had failed to agree, as to the price to be paid for such real estate, with the appellant; but the appellees had at all times refused to select an appraiser, or carry out in any manner his contract for the sale of such real estate.

Wherefore appellant asked for a specific performance of such contract; that the appellees be required to select their appraiser, and that the appraisers chosen select a third, and the appraisement be made; and that the appellees be ordered and required to execute and deliver to appellant a good and sufficient warranty deed of such real estate, or that the court appoint such appraisers, and a commissioner be appointed to convey such property; or, if this can not be done, that the court hear proof and fix the value of such property, and decree the conveyance thereof by the appellees, and make such other orders as may be just, and for all proper relief.

It appears from the copy of the lease and contract in the record of this cause, that the appellee's covenant to sell and convey the demised real estate to the appellant, and the right of the appellant to buy the same, and the manner in which the price thereof should be arrived at, are fairly and correctly stated in appellant's complaint, the substance of which we have given.

Appellee's learned counsel have not favored this court with any brief or argument in support of the ruling of the superior court. We learn, however, from the appellant's brief,

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that two points were made by appellee's counsel in argument below against the sufficiency of the complaint, namely:

First. The manner agreed upon for arriving at the price or value of the real estate, by arbitrators or a "committee of three disinterested persons," could not be enforced, and hence there could be no specific performance.

Second. The want of mutuality in the stipulations of the contract.

Both these points or questions were involved in the well considered case of *Coles v. Peck*, 96 Ind. 333 (49 Am. R. 161), and were presented there in much the same manner as they are presented here. In the case cited, after a careful and elaborate examination of the decided cases and text-books bearing upon the points under consideration, the court said: "The weight of American authority unmistakably supports the conclusion that in cases of the same general character as this, equity will take jurisdiction and grant such relief as may seem to be most expedient, or most in accord with the spirit of the agreement looking to the sale of the property." The case cited is decisive of the question of the sufficiency of the facts stated in the complaint in the case in hand to constitute an equitable cause of action in appellant's favor, and against the appellees. Without repeating the citations here, we refer generally to the decided cases and text-books cited and quoted from in the opinion of this court in *Coles v. Peck*, *supra*, in support of our decision of this cause.

Upon the point of the want of mutuality in the stipulations of the contract, in *Waterman on Spec. Perf.*, section 200, it is said: "But it is well settled that an optional agreement to convey, or to renew a lease, without any covenant or obligation to purchase or accept, and without any mutuality of remedy, will be enforced in equity, if it is made upon proper consideration, or forms part of a lease or other contract between the parties that may be the true consideration for it. * * * A contract for the sale of real estate at the option of the vendee only, upon election and notice, may not

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only be specifically enforced, but the refusal of the vendor to accept the purchase-money will not destroy the mutuality, though the vendee could thereupon withdraw his election." *Souffrain v. McDonald*, 27 Ind. 269.

Our conclusion is that the appellant's complaint states a strong *prima facie* case in his favor for equitable relief, and that the appellee's demurrer thereto ought not to have been sustained.

The judgment is reversed, with costs, and the cause is remanded, with instructions to overrule the demurrer to the complaint, and for further proceedings not inconsistent with this opinion.

Filed Nov. 3, 1885.

No. 12,257.

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| 103 | 465 |
| 146 | 296 |

MCBRIDE v. STRADLEY.

PARTNERSHIP.—*Agreement to Pay for Services of Partner.*—*Pleading.*—A partner can not recover for services rendered a firm of which he is a member, unless there is an agreement that he shall recover therefor; and a pleading, alleging that the services were rendered at the special instance and request of the members of the firm, is bad on demurrer.

SAME.—*Equity.*—*Accounting.*—Under the code of 1881, a suit between partners for an accounting is one of equitable jurisdiction, and not triable as of right by a jury.

PRACTICE.—*Pleading.*—*Harmless Error.*—Where the general denial is pleaded, it is a harmless error to sustain a demurrer to an argumentative denial.

SAME.—*Continuance.*—*Sufficiency of Affidavit.*—*Sickness.*—A party who desires the postponement of a case which he knows is set for trial, should make application in due season, fully setting forth the causes upon which he asks the delay; and the trial court is not bound to continue a cause upon the general and indefinite statement in an affidavit that a party's absence is caused by sickness in his family.

SAME.—*New Trial.*—Affidavits filed subsequent to the ruling on the application for a continuance can not be considered, except perhaps upon a motion for a new trial.

From the Whitley Circuit Court.

VOL. 103.—30

McBride v. Stradley.

C. Clemans, for appellant.

W. F. McNaghy and *T. R. Marshall*, for appellee.

ELLIOTT, J.—The complaint of the appellee alleges that he and the appellant entered into a contract of partnership, and that the latter violated the terms of the contract. Prayer for an accounting and for judgment for the amount due the appellee.

The first paragraph of the appellant's answer pleads the general denial, the second pleads payment, and the third and fourth plead special defences.

The questions first requiring attention are those arising on the ruling on demurrer to the third and fourth paragraphs of the answer.

The third paragraph alleges that the partnership is indebted to the appellant in the sum of \$500 for services performed at the special instance and request of the members of the firm. This paragraph is bad. A partner can not recover for services rendered a firm of which he is a member, unless there is an agreement that he shall recover for such services. It is the duty of a partner to devote his services to the business of the firm without compensation, except such as arises from the profits, unless there is some stipulation to the contrary. *Parsons Partnership* (3d ed.), 250; *Story Partnership* (7th ed.), section 182; *Lee v. Davis*, 70 Ind. 464; *Lassiter v. Jackman*, 88 Ind. 118.

The fourth paragraph of the answer is, in legal effect, nothing more than an argumentative denial, and as the general denial was pleaded no substantial error was committed in sustaining the appellee's demurrer.

The appellant complains of the ruling of the court refusing to postpone the trial of the case, and assigns this ruling as a cause for a new trial. The application for delay was based upon the affidavit of appellant's attorney, who states therein that he believes that the absence of the appellant was caused by sickness in his family. The affidavit shows

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that the appellant was duly notified of the time the cause was set for trial, and it was his duty to show what caused his absence, definitely and clearly. The trial court is not bound to postpone the trial of a cause upon a general and indefinite statement that a party's absence is caused by the illness of some member of his family. Affidavits filed subsequent to the ruling and trial can not be considered, for the question is, was the ruling right upon the affidavits presented to the court prior to the trial? Affidavits filed after the trial might, perhaps, be useful and influential upon a motion for a new trial or the like, but they certainly can not be given such a retrospective effect as to make an antecedent ruling erroneous.

We need not and do not decide whether the absence of a party caused by illness can properly be considered a cause for a new trial, for we think that the case here made for a new trial not strong enough to warrant a reversal, even conceding that the cause stated can be considered as a ground for a new trial. The appellant knew of the illness of his child prior to the trial, and it was his duty to have made proper application for a postponement before the cause was called for trial. He had no right to permit the cause to go to trial, take the chances of success, and subsequently urge matters known to him before the trial as grounds for relief against the judgment. Justice requires that one who desires a postponement of a case, which he knows is set for trial, should make application in due season, fully setting forth the causes upon which he asks the delay, and it also requires that he should not be permitted to wait until after a trial and an adverse decision, and then avail himself of an excuse for not being present at the trial, which was known to him before the cause was called. The business of the court, and the interests of the public, require that parties should not be allowed to take the chances of a trial in their absence and after defeat come in and secure relief for a cause fully known to them before the trial. The adverse party who expects the trial to take place at the time appointed, and makes prepara-

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tion for it, is entitled to require diligence of the other party who seeks delay. *Yater v. Mullen*, 24 Ind. 277.

The suit was one of equitable jurisdiction, and the court did right in denying a jury trial. The Constitution of our State does not, as counsel contend, give a right to a jury trial in every case; it simply preserves the right to a jury trial inviolate. It is only by force of statute that such suits as this are triable, as of right, by jury. There is now no statute creating that right; on the contrary, the present statute is exactly to the contrary. *Miller v. Evansville Nat'l Bank*, 99 Ind. 272; *Lake v. Lake*, 99 Ind. 339; *Anderson v. Caldwell*, 91 Ind. 451 (46 Am. R. 613). The decision in *Redinbo v. Fretz*, 99 Ind. 458, is based upon a former statute.

Judgment affirmed.

Filed Oct. 6, 1885; petition for a rehearing overruled Nov. 4, 1885.

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| 166 | 174 |

No. 11,809.

BOOR, ADMINISTRATOR, ET AL. v. LOWREY.

DAMAGES.—*Action for Personal Injury Does not Survive.*—*Malpractice.*—*Cases Limited.*—Under section 282, R. S. 1881, an action against a surgeon for malpractice to recover for an injury to the person, in whatever form it may be brought, does not, on the death of the defendant, survive against his personal representative. *Staley v. Jameson*, 46 Ind. 159, and *Burns v. Barenfeld*, 84 Ind. 43, limited.

ELLIOTT and ZOLLARS, JJ., dissent.

PARTNERSHIP.—*Abatement of Action Against One Partner.*—*Quare*, whether, upon the death of one of two partners sued jointly for malpractice and the consequent abatement of the action as to him, the action also abates as to the other? In any event, however, a plea is necessary.

PRACTICE.—*Abatement.*—*Arrest of Judgment.*—Where the action has abated as to one of two persons sued jointly, no judgment can be properly pronounced on a verdict against both, over a motion in arrest.

SAME.—A judgment should be arrested where such error appears on the face of the record as vitiates the proceedings.

EVIDENCE.—*Declarations of Partner.*—*When Admissible.*—To make the declarations of one partner admissible against the firm, they must have

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been made in the course of the partnership business and with respect to a transaction pertaining thereto.

SAME.—*When not Admissible.*—*Res Gestæ.*—The admissions and declarations of one partner, made after the event to which they relate has transpired, are not admissible against the other unless part of the *res gestæ*.

SAME.—*When Opinion of Physician as to Treatment of Case not Binding on Partner.*—Opinions expressed by one physician, in the absence of his partner, after the employment is at an end, as to the propriety of the treatment or the results attained, are not binding on the latter.

SAME.—*Expert.*—*Hypothetical Question.*—*Province of Jury.*—In an action against a surgeon for malpractice, a hypothetical question which asks a witness to assume that statements made by the defendant as to the cause of certain depressions and enlargements about a dislocated joint, with all the other facts supposed, are true, and upon the whole question give his opinion as an expert whether a reduction of the joint was accomplished, is within the rule.

From the Fayette Circuit Court.

J. H. Mellett, E. H. Bundy, J. Brown, W. A. Brown and R. Conner, for appellants.

T. B. Redding, D. W. Chambers and J. S. Hedges, for appellee.

MITCHELL, C. J.—Isaac Lowrey brought this action against Luther W. and Frank C. Hess, to recover damages alleged to have resulted from the negligent and unskilful manner in which they set and treated his shoulder, which had been dislocated and fractured.

It is charged in the complaint, that the defendants were partners, engaged in the practice of medicine and surgery, and that the plaintiff, having sustained a fracture and dislocation of his shoulder, employed them, and they undertook, for a certain reward, to set, reduce and treat it, and that they executed their undertaking so negligently and unskilfully as that his arm and shoulder became and remain stiff, immovable and fixed, in an unnatural position; that in consequence of their negligence and unskilful treatment, he suffered and still suffers great pain, distress and impairment of health, and that he is permanently disabled from pursuing his usual avocation. Incidentally, it is recited that in attempting to bet-

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ter and cure his arm and shoulder, he has expended \$300. Damages are laid at \$10,000.

While the cause was pending Luther W. Hess died, and his death was suggested on the record. Thereupon, Walter A. Boor, administrator of his estate, was substituted as a defendant. Over the several objections of both defendants, the action was prosecuted to final judgment, resulting in a recovery against the estate of the one, and against the other personally for \$6,000.

First in the order of presentation and in importance is the question, whether, after the death of Luther W. Hess, the action survived against his personal representative?

It is plainly enacted in the statute, section 282, that "A cause of action arising out of an injury to the person dies with the person of either party, except in cases in which an action is given for an injury causing the death of any person," etc.

The rule *actio personalis moritur cum persona*, is thus transformed from an ancient maxim of the common law into an express statutory declaration, except only in the cases provided for by its terms. It is said, however, that where a duty is founded upon contract, even though the breach of it may be in tort, an action *ex contractu* may, at the election of the person injured, be maintained, and that where the action is thus brought, it survives notwithstanding the statute. In support of this contention, *Staley v. Jameson*, 46 Ind. 159 (15 Am. R. 285), and *Burns v. Barenfield*, 84 Ind. 43, are relied on. These were cases against surgeons for malpractice, and both turned upon the statute which requires actions for injuries to the person to be commenced within two years. In each it was held that the action was in form *ex contractu*, and that the statute limiting the time for the commencement of actions for injury to the person did not apply.

What the particular damages were which were claimed as the subject of the actions, respectively, does not clearly appear from the statement of the complaint in either case. It

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must be assumed, however, that the actions were for the recovery of special damages, which had relation to property. They were not, therefore, actions to recover for injuries to the person. If they were, the conclusions reached can not be maintained.

This assumption would seem to be justified by an examination of the authorities upon which the decisions are made to rest. Those which support the conclusion reached are cases involving injury to personal property. *Dale v. Hall*, 1 Wilson, 281; *Burnett v. Lynch*, 5 B. & C. 589.

It may be that actions *ex contractu* are maintainable for the recovery of special damages resulting from a breach of duty founded on contract, even though injury to the person results. The action thus maintainable, however, is not, and can not be predicated upon the personal injury, nor to recover damages resulting from injuries to the person. The action must involve injury to the estate, and not to the person. Where the primary cause of action is an injury to the person, and the damages sought to be recovered relate primarily to such personal injury, the statute which provides that actions to recover damages for injuries to the person die with the person of either party, can not be abrogated by the mere form in which the action is brought.

The case of *Bradshaw v. Lancashire, etc., R. W. Co.*, L. R. 10 C. P. 189, affords an example of the instances in which actions sounding in tort may survive. In that case the declaration stated that the testator, a boot and shoe manufacturer, had become a passenger on the defendant's railway, to be carried on a certain journey for a reward, and that they promised to take due care whilst carrying him as such passenger. Breach, that the defendants did not take care in carrying him, whereby he was injured, and incurred expense in medical attendance, and was prevented from attending to his business, and from personally conducting the same, and that great loss and damage was thereby occasioned to the personal estate of the testator. It was contended that because of the death of the testator the

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executrix could not maintain the action. But as the ground of the action was to recover damages which accrued to the estate of the testator in his lifetime, such as medical and other expenses, and for injury to business resulting directly from the breach of the contract to carry, it was held the action survived.

Of the same character was the case of *Potter v. Metropolitan, etc., R. W. Co.*, 30 L. T. (N. S.) 765; S. C., 32 L. T. (N. S.) 36. In that case, after quoting from *Knight v. Quarles*, 2 Brod. & Bing. 102, to the effect that if, through the default of a carrier, one sustains an injury to his person, whereby his means of improving his personal property were destroyed, his executors might sue, BRAMWELL, B., said: "Now here there has been a breach of contract, which has caused a loss, which has fallen upon the personal estate," and it was held that the action was maintainable to recover for such loss.

Again, when the case came before the Exchequer Chamber, Lord COLERIDGE, C. J., said: "From a breach of the contract on the part of the defendants a loss or damage accrued to the personal estate of the plaintiff's testator." Accordingly it was held that where there was a promise and a breach of it in the lifetime of the testator, resulting in an injury to his personal property, an action in assumpsit might be maintained to recover for such injury. So, also, it is said in 2 Williams Exrs., pp. 876, 877: "If the executor can show that damage has accrued to the personal estate of the testator by the breach of an express or implied promise, he may well sustain an action, at common law, to recover such damage, although the action is in some sort founded on a tort." See, also, *Tichenor v. Hayes*, 41 N. J. L. 193 (32 Am. R. 186; 9 Cent. L. J. 470).

This much has been said to limit the cases of *Staley v. Jameson*, *supra*, and *Burns v. Barenfield*, *supra*, to the class of actions to which they were doubtless intended to have application.

It is not necessary that we should determine the particular character of special damage to property which might

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be recoverable in an action on contract where injury to the person was an incident. It is enough to say this action is brought primarily to recover for injury to the person. That an action, the purpose of which is to recover for an injury to the person, can not be maintained after the death of the person committing the injury, is, we think, supported by all the authorities, and this, too, regardless of the form in which it is brought.

In *Stebbins v. Palmer*, 1 Pick. 71, it was held that an action for breach of promise of marriage would not survive against the personal representative of the promisor. WILDE, J., said: "The distinction seems to be between causes of action which affect the estate, and those which affect the person only: the former survive for or against the executor, and the latter die with the person."

Following this case, COLT, J., said, in *Kelley v. Riley*, 106 Mass. 339 (8 Am. R. 336), a similar case: "The action could not be continued to summon in the administrator, because, as no special damage is alleged, it does not survive."

In the later case of *Chase v. Fitz*, 132 Mass. 359, which was an action of the same complexion, in which an attempt was made to charge special damage, it was held that the neglect or refusal to perform an invalid executory contract could not constitute a basis for special damage. After defining, to some extent, what was meant by the phrase "special damage," as used in the class of cases to which this belongs, it was held that the action did not survive against the personal representative. See, also, *Smith v. Sherman*, 4 Cush. 408; *Grubbs v. Sult*, 32 Grat. 203 (34 Am. R. 765); *Dillard v. Collins*, 25 Grat. 343. In the case of *Wade v. Kalbfleisch*, 58 N. Y. 282 (17 Am. R. 250), which was an action for breach of marriage contract, brought in form *ex contractu*, the court by CHURCH, C. J., said: "Although, in form, this action resembles an action on contract, in substance it falls within the definition of the exception, as an action on the case for personal injuries. * * * The controlling con-

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sideration is, that it does not relate to property interests, but to personal injuries." In that case it was intimated that as the cause of action was for personal injuries, and as it was indivisible, if the personal features of the action were abandoned, leaving nothing but the incidents, special damages were not recoverable. *Zabriskie v. Smith*, 13 N. Y. 322. In *Lattimore v. Simmons*, 13 Serg. & R. 183, the same question was involved. In that case, as in this, the action had been brought in the lifetime of the contracting parties. The defendant having died pending the action, the question was, whether it survived against his executors. TILGHMAN, C. J., in the course of the opinion, said: "But the counsel for the plaintiff rely on the contract in this case, and on some general *dicta* that all actions founded on contract, survive. This position is too general. If true, it must extend to contracts implied as well as expressed. Suppose the case of a physician or surgeon, who by unskilful treatment injures the health of a patient. Here is a breach of an implied contract; and yet it will hardly be contended, that in case of death, the cause of action would survive. It seems reasonable, therefore, to confine the survivor of action, to cases in which actual property is affected, even though there be an express contract." So, too, in the case of *Chamberlain v. Williamson*, 2 M. & S. 408, Lord ELLENBOROUGH said: "Executors and administrators are the representatives of the temporal property, that is, the debts and goods of the deceased, but not of their wrongs, except where those wrongs operate to the temporal injury of their personal estate. But in that case the special damage ought to be stated on the record; otherwise the court can not intend it. * * All injuries affecting the life or health of the deceased; all such as arise out of the unskilfulness of medical practitioners; * * would be breaches of the implied promise by the persons employed to exhibit a proper portion of skill and attention. We are not aware, however, of any attempt on the

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part of the executor or administrator to maintain an action in any such case."

The case of *Vittum v. Gilman*, 48 N. H. 416, was an action against the personal representative of a deceased surgeon, and is directly in point. In that case it was said: "It is generally true that a cause of action arising *ex contractu* survives against the executor; and it is generally true that a cause of action arising *ex delicto* dies with the wrong-doer. In both cases there are well established exceptions. In respect to the latter, if the offender acquires no gain to himself at the expense of the sufferer, as by beating or imprisoning a man, or by slander, the cause of action does not survive; but if by the wrong, property is acquired by the wrong-doer whereby his estate is benefited, an action in some form will lie against the executor to recover the value of the property." This case was approved and followed in the later case of *Jenkins v. French*, 58 N. H. 532. In this last case it was held that where the cause of complaint is for injury to property, to which a personal injury is merely an incident, the action survives, but where the cause of action is for an injury to the person, and property is merely incidentally affected, it does not survive. To the same effect is *Wolf v. Wall*, 40 Ohio St. 111.

In the case under consideration, the cause of action stated in the complaint, and for which damages are claimed, is the injury to the person of the plaintiff. The injuries recited which might be classed as injuries affecting property are merely incidents growing out of the injury to the person. In whatever form an action might be brought to recover for such injuries, it must be held to abate with the death of the defendant, as well within the common law maxim as within the express terms of section 282, R. S. 1881.

It might well be said within the holding in *Goble v. Dillon*, 86 Ind. 327 (44 Am. R. 308), that the action was brought in form *ex delicto*, but we choose to put it on the broader ground, that regardless of the form in which the action is brought,

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since the injury for which a recovery is sought is an injury to the person, it can not survive the death of the defendant.

In respect of the personal representative of the estate of Luther W. Hess, it was error for the court to require him to answer for the estate of his decedent, over his motion to dismiss.

The question remains, whether by the death and consequent abatement of the action as to Luther W. it also abated as to Frank C. Hess?

Upon the record as it comes before us, we are not prepared to hold that the death of one partner had the effect to abate the action as to both.

As the judgment which was pronounced in the court below must of necessity be reversed, and as this question does not seem to have received such attention in the argument as its importance merits, we do not now until fuller argument decide it. Ordinarily, torts are joint and several, and each *tortfeasor*, who is shown to have participated in the wrong, is liable for the whole damage. It is suggested, however, that this only applies to cases of intentional wrong, and that because neither of the defendants who were employed as surgeons, may have been willing to undertake the case without the skill and experience of the other, their liability was joint, and not several, and that the abatement of the action as to the one discharged the other. The statement of these propositions on the one side is the extent of the argument relating to the point mentioned on both, and for the reasons already stated we leave the question undecided. Moreover, we think, without a plea, no cause for the abatement of the action is shown upon the face of the record as to the defendant Frank C. Hess. While it is true, that because the record contained a suggestion of the death of Luther W., the cause for the abatement of the action was, as to him, apparent on the face of the record, this did not *ipso facto* abate the action as to his co-defendant. If the action did in fact abate as to him, it must have been upon some cause in addition to

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the death suggested, and a plea was, therefore, necessary to bring it on the record.

The action having been prosecuted jointly against the administrator of the deceased partner and the surviving partner, and a joint verdict having been returned against both, since the action had abated as respects the one, no judgment could rightfully be rendered on such verdict over a motion in arrest against both, even if it could have been at the plaintiff's election against the survivor. *Allen v. Wheatley*, 3 Blackf. 332; *Palmer v. Crosby*, 1 Blackf. 139; *Everroad v. Gabbert*, 83 Ind. 489, and cases cited.

After the death of Luther W. Hess was suggested on the record, the case stood to all intents and purposes in legal contemplation as a case against the surviving defendant alone. The proceedings thenceforth, so far as they treated the case as an action against two, were all erroneous, and the verdict having been returned against two, in an action to which in contemplation of law there was but one defendant, it was so radically defective as that no judgment could be pronounced upon it over a motion in arrest.

The court is bound to arrest the judgment where there is such error appearing on the face of the record as vitiates the proceedings. Ordinarily, the objection should be taken by a motion for a *venire de novo*. But as upon the whole record, including the verdict, no judgment could properly be rendered, we think the motion in arrest was well taken.

It was shown that after the plaintiff had been discharged by the surgeons as not requiring further attention from them, he, with his son and one Priddy, called upon Luther W. Hess in the absence of Frank C., and engaged him in conversation. Neither the purpose in going, nor the conversation had while there, had any relation to the further treatment of the plaintiff, but rather to the condition of the shoulder as it then was. This conversation having taken place in the absence of Frank C., objection was made to the introduction in evidence of alleged admissions and declarations made by Luther

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W. during its progress. The declarations of one partner are admissible in proper cases against the firm, on the ground that in such cases the law implies an agency on the part of the one to bind the firm in transactions relating to its business. In order that such declarations may be admitted, they must have been made in the course of the partnership business, and with respect to a transaction pertaining to its business.

In this respect declarations of a partner, made in the absence of the other partners, stand upon the same footing with the declarations of other agents. Abbott Trial Ev. 218; *Hahn v. St. Clair, etc., Co.*, 50 Ill. 456; *Graham v. Henderson*, 35 Ind. 195; *King v. Barbour*, 70 Ind. 35; *LaRose v. Logansport National Bank*, 102 Ind. 332.

Neither the admissions nor declarations of Luther W. Hess, made after the event to which they referred had transpired, could properly be received in evidence to bind Frank C. Hess, unless they were so immediately connected with the event as to become part of the *res gestæ*. *Pittsburgh, etc., R. R. Co. v. Theobald*, 51 Ind. 246.

If the one had administered an improper prescription, or neglected to do something proper, the other would have been answerable for his acts or omissions. But for opinions expressed by the one, in the absence of the other, after the employment was at an end, as to the propriety of the treatment, or the results attained, the absent partner is not responsible.

The rule is especially applicable in cases involving negligence where no common motive is imputable. Ordinarily, the declarations of one in the absence of the other, in such cases, are not admissible. 1 Greenl. Ev., section 111, and notes.

Over the objection of the administrator, the plaintiff was permitted to testify as to matters occurring and conversations had with the deceased during the course of the reduction and treatment of the dislocated shoulder.

The plaintiff was admitted to testify, on the ground that the deceased had previously testified on a former trial, and

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that his testimony was available to be used as evidence for the administrator.

It is claimed that the testimony was admissible under the proviso of section 498, R. S. 1881. This section relates to suits or proceedings in which an executor or administrator is a party.

As it results from the conclusion already reached that when the death of Luther W. Hess was suggested upon the record, the action at once abated as to him and his personal representative, it also follows that his administrator was not, and could not be made, a party to the suit.

The question sought to be made is, therefore, not properly before us for decision. As presented, the question has relation to the admissibility of the plaintiff's testimony, on the assumption that the administrator was a party to the suit. But as he was not a party to the action, we need not decide what testimony would, or would not, have been competent in case he had been. In other words, we will not assume a state of facts which did not exist, and decide the question on the assumption that such facts did exist.

The only pertinent inquiry in this connection, in the event of another trial against the surviving partner, is as to the limitations under which admissions by one partner in the absence of the other may be given in evidence. To what has been already said on that subject we have nothing to add.

During the progress of the trial, the plaintiff called a number of surgeons as witnesses to testify in his behalf as experts. To each of these, a hypothetical question, of substantially the same import, was put, and, upon the supposed facts embraced in the question, the witness was asked whether or not there had been a reduction of the dislocation accomplished by the attending surgeons, provided the state of facts supposed existed. In answer to the question thus put, one of the experts answered, over objection, as follows: "I would say that, during the time of the continuance of these surgical facts and landmarks, there was a dislocation.

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about that time for a long or short while." Another said, in answer, "Well, you have described a case and the symptoms of an ordinary dislocation."

The objection which is urged to the hypothetical question is, that it embraced, among other things, statements of what the attending surgeon is supposed to have said to the patient during the process of reduction and treatment, concerning the cause of certain depressions and enlargements about the dislocated joint. It is argued that the effect of the question was to extract from the witness an opinion as to the truth of what the surgeon said to the patient, and that thereby the witness was called upon to invade the province of the jury. Upon careful examination of the question propounded we do not think it subject to the objection urged.

We can not discover that the question calls upon the expert to determine whether the statements of the attending surgeons were true or false. Rather it asks the witness to assume that the statements made, with all the other facts supposed, are true, and upon the whole question give his opinion as an expert whether a reduction of the dislocated joint was accomplished. We think the question was within the rule, and that, in any event, the answer worked no harm to the defendants. *Goodwin v. State*, 96 Ind. 550; *Burns v. Barenfield*, 84 Ind. 43.

Some question is made concerning the sufficiency of the evidence, but as, for the reasons already stated, a reversal of the judgment must result, no good purpose can be subserved by examining and passing upon the evidence.

In reference to the instructions, upon some of which error is predicated, it is claimed they are not properly in the record. However this may be, as they involve questions of no essential importance to the case, and such as can hardly again arise, we do not inquire whether they are in the record or not.

For the errors indicated the judgment is reversed with costs, with instructions to the court below to dismiss the action as to Walter A. Boor, administrator, etc., and to set

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aside the judgment and grant a new trial as to Frank C. Hess and for further proceedings in accordance with this opinion.

Filed Nov. 4, 1885.

DISSENTING OPINION.

ELLIOTT, J.—I think there may be damages recovered for a breach of contract, although in computing the damages it may be necessary to estimate injuries to the person, as, for instance, if a steam engine should be sold under a fraudulent warranty, but, because of a defect constituting a breach of the warranty, the purchaser should have his arm blown off, this fact might be taken into consideration in computing damages. It is my opinion that the statute applies only to cases of pure torts unmixed with any element of contract, and does not deny a recovery for damages resulting from a breach of contract, although the damages may arise from a bodily injury.

I concur, however, in the general conclusion reached, for the reason that I regard the complaint as in tort and not in contract. If the complaint had been in contract, then, as it seems to me, the injury to the person of the plaintiff arising from the breach of the implied contract to treat the arm with skill and care might have constituted an element in the admeasurement of damages.

ZOLLARS, J., concurs in the opinion of ELLIOTT, J.

Filed Nov. 4, 1885.

No. 12,420.

THE STATE v. LONG.

CRIMINAL LAW.—*False Pretences.*—*Evidence.*—An indictment for obtaining a loan of money by false pretences charged that the defendant falsely represented that he was the owner of a certain amount of stock in a manufacturing company; that he was solvent and able to pay all

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his debts, which did not exceed a certain sum; that he was largely indebted to certain named persons in specified amounts, and also "owed other debts, the amount of which, and the persons to whom they were due, were to the grand jurors unknown." The indictment did not negative the representations of solvency, nor charge that the defendant, in direct terms, represented that such stock was unpledged.

Held, that it was not error to exclude evidence, offered by the State, that the stock was pledged to secure an indebtedness, due and unpaid, exceeding its value.

Held, also, that under the general averment of an indebtedness not specifically set out, the testimony of one not named in the indictment, that the defendant owed him a certain sum at the time the representations were made, was admissible.

SAME.—Previous Statements to Third Person.—Admission.—In such case evidence that not long prior to the making of the representations complained of, the defendant made similar representations to a third person, and afterwards admitted their falsity, was admissible, as tending to prove the untruth of the statements charged.

From the Wayne Circuit Court.

F. T. Hord, Attorney General, and *J. F. Robbins*, for the State.

NIBLACK, J.—Josiah C. Long was indicted, tried and acquitted in the court below for obtaining, as was charged, the loan of \$100 from one Caleb W. Price by false pretences.

This appeal is prosecuted by the State under sections 1845, 1846, 1882 and 1883, R. S. 1881, for the review of certain questions reserved at the trial.

The indictment charged that, on the 6th day of February, 1884, the appellee, for the purpose of obtaining a loan of \$100 from the said Caleb W. Price, feloniously, knowingly and designedly made divers and certain false representations to him, amongst which were that he, the appellee, was then and there the owner of \$5,000 worth of stock in the Ezra Smith & Co. Manufacturing Association, a corporation doing a large and extensive business in the city of Richmond, in this State, the stock in which was worth seventy cents on the dollar, thereby intending to induce him, the said Price, to believe that he, the appellee, held and owned said stock,

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free from any pledge, security, lien, debt or encumbrance, and also that he, the appellee, was at the time solvent and able to pay all his debts which did not then exceed the aggregate sum of \$300. Whereas, in truth and in fact, he, the appellee, was not, at the time, the owner of \$5,000 worth of stock in said Ezra Smith & Co. Manufacturing Association, and was not the holder of such stock free from any pledge, security, lien, debt or encumbrance, but all of his stock in said association was then pledged and deposited as collateral security for the payment of certain debts which he then owed as follows: Forty shares to one Thompson to secure the payment of \$700; thirty shares to one Graves to secure the payment of \$775, and twenty-seven shares to Susan Githens to secure the payment of \$500; and whereas, in truth and in fact, he, the appellee, at the time owed large sums of money, to wit, to one Graves \$1,500; to one Thompson \$700; to the First National Bank of Richmond \$650; to one Brown \$219; to one Vanzandt \$600; to one Binkley \$75; to one Smith \$50; to Susan Githens \$700, and to one Bellinger \$50, making a total aggregate indebtedness of \$4,579, and then owed other debts the amounts of which and the persons to whom they were due were to the grand jurors unknown.

After evidence had been introduced tending to prove that the defendant had, at the time specified, made representations to Price similar to those charged in the indictment, Susan Githens was called as a witness on behalf of the State, and testified that, at the time named, the defendant was indebted to her in the sum of \$700. The prosecuting attorney then proposed to prove by the witness that when the representations alleged to be false were made, all the stock of the defendant in the Ezra Smith & Company Manufacturing Association was pledged and hypothecated to, and deposited with, her as security for an indebtedness to her exceeding the value of the stock, which indebtedness was then past due and remained wholly unpaid, but the circuit court excluded the proof thus proposed to be made, and the prosecuting attor-

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ney reserved a question for decision by this court upon that ruling of the circuit court.

This ruling was based upon the ground that the indictment did not charge the appellee with having in direct terms represented that the stock in question was unpledged and unincumbered with any lien upon it, and in that view we can not hold that the proof proposed was erroneously excluded. Nor was such proof admissible to establish the insolvent or generally bad financial condition of the appellee, since the indictment did not negative the appellee's alleged representation that he was solvent and able to pay all his debts.

It was mutually admitted at the trial that the grand jury, when it returned the indictment, had no knowledge of, nor means of ascertaining that there was, an indebtedness by the appellee to one Bradbury, and proof that there was no such knowledge or means of ascertaining on the part of the grand jury was expressly waived. Thereupon the prosecuting attorney also called Bradbury as a witness, and offered to prove by him that at the time the representations complained of were made, the appellee owed him \$100, but this offered proof was also excluded by the circuit court, and a question was also reserved by the prosecuting attorney upon that decision of the circuit court.

It is fairly deducible from the authorities, that where the name of a person connected with a transaction set forth in an indictment was unknown to the grand jury, and the indictment charges his name to be unknown, but where his name afterwards becomes known, he may be described at the trial by his particular name. But in this case it was made presumptively to appear that neither the indebtedness to, nor the person of, Bradbury was in the minds of the grand jurors when the indictment was returned. Whart. Crim. Ev., section 97, and note; *Commonwealth v. Hendrie*, 2 Gray, 503; *White v. People*, 32 N. Y. 465.

The proposed evidence of Bradbury did not, therefore, fall strictly within the rule above stated. We are of the opinion,

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nevertheless, that the evidence was admissible under the general averment of a greater indebtedness than that specifically set out in the indictment.

One Gilbert was also called as a witness for the State, and upon an objection being made to a question addressed to him as a witness, the prosecuting attorney stated that he was seeking to prove, and expected to prove, by the said Gilbert, that not long prior to the time at which Price claimed that the representations, charged in the indictment, were made to him, the appellee made substantially the same representations to him, Gilbert, as those testified to by Price, and afterwards admitted to him, Gilbert, that the representations thus made to him were false. The circuit court, however, refused, to permit the proposed evidence to be introduced, and the prosecuting attorney likewise reserved a question upon that refusal of the circuit court.

No sufficient reason for the exclusion of the facts thus sought and expected to be proven is readily apparent. The admission of the appellee that the statements he made to Gilbert were false would certainly have tended, at least in an indirect and inferential way, to prove that similar statements soon after made to Price were also untrue, and known to be so when made. The facts, therefore, proposed to be proven by Gilbert were material and competent for the consideration of the jury.

One Bellinger was also produced as a witness for the State, and an offer was made to prove by him other representations similar to those testified to by Price, but the offer thus made was held to be inadmissible, and a still further question was reserved upon that action of the circuit court.

In argument counsel for the State challenge the correctness of so much of the opinion of this court in the case of *Todd v. State*, 31 Ind. 514, as may be considered to have a bearing upon the question reserved as lastly above stated, and insist that, in the respect stated, that case can not be safely followed as a precedent. But we have no brief from the appellee, and

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the argument submitted on behalf of the State is not exhaustive; hence we do not regard the occasion as a favorable one for a review of the case thus challenged, or for a formal ruling upon the precise question intended to be raised by the presentation of Bellinger as a witness.

The appeal is sustained, at the costs of the appellee.

Filed Nov. 4, 1885.

No. 11,478.

THE BALTIMORE AND OHIO AND CHICAGO RAILROAD COMPANY v. NORTH ET AL.

JUDGMENT.—*Complaint to Impeach for Want of Notice of Pendency of Action.*—*Collateral Attack.*—Where a party, by complaint in another suit, seeks to impeach the judgment of a court of superior jurisdiction upon the ground that he had no legal notice of the pendency of the suit in which such judgment was rendered, he must allege what, if anything, is shown by the record in relation to notice to him.

DRAINAGE.—*Notice of Petition.*—*Injunction.*—*Pleading.*—An averment in a complaint to restrain the construction of a ditch and the collection of an assessment, that the plaintiff "never had any notice whatever of the proposed drainage, or of any proceedings under said petition, and never had any opportunity afforded it to appear and contest the same," is not a sufficient averment of the failure to give the statutory notice required in such proceedings.

SAME.—*Constitutionality of Act of 1881.*—The drainage act of 1881 is a valid and constitutional exercise of legislative power.

SAME.—*Appropriating Land Taken for One Public Use to Another.*—Lands once taken for a public use can not, under general laws, without an express act of the Legislature for that purpose, be appropriated by proceedings *in invitum* to a different public use.

SAME.—*Legislative Intent.*—A legislative intent to subject lands devoted to a public use, already in exercise, to one which may thereafter arise, will not be implied from a grant of power, made in general terms, as in the drainage laws of this State, without special reference to an existing necessity for the subsequent use, where it appears that both uses can not stand together, and the latter, if exercised, will greatly endanger the exercise of the former.

SAME.—*Railroad.*—*Right of Way.*—*Power to Establish Drain Upon.*—The cir-

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cuit court has no power to establish and order the construction of a ditch upon the right of way of a railroad company.

From the Marshall Circuit Court.

H. Newbegin, J. Morris, B. B. Kingsbury and M. A. O. Packard, for appellant.

J. W. Parks, H. Corbin and S. D. Parks, for appellees.

Howk, J.—A number of errors are assigned by the appellant, the plaintiff below, upon the record of this cause. The controlling questions in the case, however, are fairly presented for our decision by the alleged errors of the court in sustaining the appellees' demurrers to the appellant's complaint.

In its complaint, the appellant alleged that it was a corporation organized under the laws of this State, and was the owner of a line of railway extending from Chicago Junction, in the State of Ohio, to the city of Chicago, in the State of Illinois, and through North township, in Marshall county, in this State; that, by proceedings duly had under the laws of this State, and by purchase, the appellant duly acquired a strip of land, six rods wide, extending through sections 25 and 26, in township 35 north, of range 2 east, in North township, in Marshall county, for the construction and maintenance of its railway track, whereon passengers and freight were transported, and all the traffic usually done upon railways was conducted; that by the laws of this State, the appellant was subjected to great responsibility for the safe carriage of passengers and freight on its railway; that, to fully meet its responsibilities, it was essential that appellant should have the exclusive possession and control of its entire right of way along its track in such sections 25 and 26, for the proper and safe maintenance of its road-bed, the repairs thereof, the maintenance of fences erected between its track and the adjacent lands, which by law it was bound to maintain, as well as for the construction of a second track, side-tracks, switches and station and depot grounds, whenever by

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increase of business the same might be demanded; that, at the June term, 1882, of the court below, a petition was presented for the drainage of their lands by the appellees Forsythe and five others, claiming to be the owners of lands in the vicinity of the proposed drainage, which included and affected appellant's right of way; but the appellant averred that it never had any notice whatever of such proposed drainage, or of any proceedings under such petition, and never had any opportunity afforded it to appear and resist the same, so far as its right of way or franchises would or might be affected thereby.

And the appellant further said, that notwithstanding it had no notice of any of the proceedings in the court below, under such petition, the appellee North had directed his co-appellee, Kimball, to proceed upon appellant's right of way in such sections 25 and 26, and to excavate a ditch upon and along its right of way for the distance of about one mile; that the appellee North, as drainage commissioner, claimed and pretended to be acting under an order of court, declaring the proposed work established and directing him to construct the proposed work; that the appellee North claimed to have made an assessment against appellant in the sum of \$20, but the same was wholly void against appellant, but that he would, if not restrained, seize and sell its personal property to collect such assessment; that if such ditch were constructed on the line established, which the appellee North, and appellee Kimball acting for and under him, were then threatening and attempting to do, it would in effect appropriate, for the benefit of the petitioners for such drainage, the use of lands theretofore appropriated for the exclusive use of appellant in the construction and maintenance of its roadway, without any compensation therefor first assessed and tendered or paid, as required by section 21 of the bill of rights in the Constitution of this State; that the laws under which the appellees were seeking to construct and maintain a ditch, upon appellant's right of way, were unconstitutional and void in

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this, that they did not provide appellant a remedy by due process of law for injury to its property in the location and establishment of such ditch; that the proceedings, orders and judgment of the court below, in the matters of such drainage, in so far as they affected appellant, were void and of no effect; that the laws under which such proceedings and orders were had were in contravention of section 1 of article 14 of the amendments of the Constitution of the United States, in this, that such laws by their operation seek to deprive appellant of its property without due process of law, and to deny it with respect to its property the equal protection of the law, and, further, permit the appellees by acting under color of such laws to deprive appellant of its property, without due process of law, which, under such orders of the court, the appellees were about to and would do if not restrained by the court.

And the appellant further alleged that such intended and threatened appropriation of appellant's lands, under color of such drainage proceedings, was wholly unnecessary for the purpose of the proposed drainage, as prayed for; that the construction of such ditch, under the proceedings aforesaid, would deprive appellant of the exclusive possession and control of its right of way through the aforesaid sections 25 and 26, and would subject appellant to increased liability and additional burdens, inconsistent with the proper discharge of its duties and liabilities under the laws of this State, and for which no compensation was or could be made under the provisions of the drainage laws of the State; that the construction of such ditch would bring upon appellant's right of way an increased flood of water, endangering its road-bed; that the repairs of such ditch would be under the control of officials, over whom appellant could have no control or supervision, and the divided control and supervision of such right of way would prove detrimental to appellant's interests, so long as such ditch should be maintained thereon; that such ditch, whether constructed on the located route or some route

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adjacent thereto, would be of no benefit whatever to appellant's right of way or track ; that it was not competent, under any form of proceeding for the establishment of a ditch along or near the line of its road, to charge against appellant any benefits or assessments, for a supposed special benefit accruing to it from the construction thereof; that, under its obligation to keep up a safe and proper roadway, appellant was and would be compelled to construct and maintain all ditches and drains necessary or useful for that purpose; and that the laws of this State concerning drainage did not provide any equitable basis of assessment against the property of the appellant, and were therefore invalid. Wherefore the appellant prayed for a temporary order restraining the appellees, the drainage commissioners, and those acting under them, from proceeding further in the construction of the proposed ditch, on and along its right of way, and further restrain appellee North from attempting to collect any assessment whatever against appellant, and further restraining all the other appellees from further proceedings, by amendment or otherwise, in such drainage proceedings, to construct such ditch on and along appellant's right of way; that such proceedings and orders might be declared void and of no effect, in so far as appellant's rights were concerned; and that, upon a final hearing, the injunction against the establishment of any ditch on and along appellant's right of way, under color of such drainage proceedings, might be made perpetual, and for other proper relief.

The appellees, the drainage commissioners, demurred to appellant's complaint, upon the following grounds of objection:

1. The court had no jurisdiction of the persons of the appellees, nor of the subject of the action;
2. The complaint does not state facts sufficient to constitute a cause of action; and,
3. Several causes of action had been improperly joined.

The second of these grounds of demurrer, namely, that the

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complaint does not state sufficient facts, presents the questions discussed by the learned counsel of the appellant, in their able and exhaustive brief of this cause. The questions thus presented are stated by counsel substantially as follows:

First. It is directly charged in the complaint, and admitted by the demurrer, that the plaintiff had no notice or knowledge even of the pendency of the ditch proceedings.

Second. The law under which such ditch proceedings were had is in contravention of the first clause of section 12, and the last clause of section 21, of the Bill of Rights in our State Constitution.

Third. The law in question is also repugnant to section 1 of article 14, of the Constitution of the United States. And,

Fourth. It was not competent in law to appropriate to the use of such ditch appellant's right of way, which had been acquired by it for its necessary use in its service to the public; especially so, as the complaint shows that the new use will be destructive of the old use, and is not necessary.

Each of these questions we will consider and decide in their enumerated order.

1. In considering the first question appellant's counsel correctly say that "notice was a jurisdictional question, precedent to the exercise of any power in the premises by the court." But it must be borne in mind that appellant, in its pending suit, makes a collateral attack upon the proceedings, orders and judgment of the trial court, in the suit or proceeding of Forsythe and others to locate the ditch, and establish and construct the same, complained of by appellant in its complaint herein. In considering questions which arise upon such an attack, every presumption is indulged in favor of the validity of the proceedings, orders and judgment, when sought to be impeached collaterally by a party to the record; and where their validity is called in question by the complaint of such a party, in a collateral suit or proceedings, he must allege such facts in his complaint as will overcome or exclude all reasonable presumptions in favor of their validity. Ac-

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cordingly, it has been held, and correctly so, we think, that where a party seeks, by complaint in another suit, to impeach the proceedings, orders and judgment of a court of superior jurisdiction, upon the ground that he had no legal notice of the pendency of the suit, wherein such proceedings, orders and judgment were had, made or rendered, he must allege in his complaint what, if anything, is shown in or by the record in relation to notice to him in such suit. *Exchange Bank v. Ault*, 102 Ind. 322.

If the Marshall Circuit Court had jurisdiction of the subject-matter of the petition of Forsythe and others for the location and construction of the ditch complained of, we would be bound to presume, in the absence of any sufficient averment to the contrary, that, by giving the statutory notice in the manner and for the time prescribed by the statute, and by making the requisite proof thereof, such court had acquired such jurisdiction of the person of the appellant as would enable it to make or render the orders and judgment in such ditch proceedings which appellant asked the court in its pending suit to declare void and of no effect. *Exchange Bank v. Ault*, *supra*.

In the statute under which Forsythe and others petitioned the Marshall Circuit Court for the drainage of their lands, section 4275, R. S. 1881, it is provided as follows: "When it shall be made to appear by affidavit that notice of the intention to present such a petition has been posted for twenty days in three public places in each township where the lands described in the petition are situated, and near the line of the proposed work, and one at the door of the court-house of each of the counties in which said lands are situated, the court shall hear the same," etc.

In speaking of these statutory provisions on the subject of notice, in *Scott v. Brackett*, 89 Ind. 413, the court said: "It will be observed that this statute makes no provision for personal notice. The only notice required is constructive. With such notice, a lien may be fixed upon the land affected by the

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proposed work. Without it, no lien can be acquired, though it is so declared. This is elementary, as every man must have 'his day in court.' *Campbell v. Dwiggins*, 83 Ind. 473."

In the case in hand, it must be observed that it is nowhere alleged, in appellant's complaint, that, upon the petition of Forsythe and others, the statutory notices of the intention to present such petition had not been posted for the time and in the places, and proof thereof made in the manner, required by the statute. The appellant's allegation, as to want of notice, is as follows: "But this plaintiff says, that it never had any notice whatever of the proposed drainage, or of any proceedings under said petition, and never had any opportunity afforded it to appear and contest the same, so far as it could or might affect its right of way or franchises acquired as aforesaid." We need not argue for the purpose of showing that this allegation was not sufficient. The most that is alleged is, that the appellant never had any notice whatever of the proposed drainage. It is nowhere alleged in appellant's complaint, as we have already said, that the proper notice of the intention to present the petition of Forsythe and others had not been given precisely in conformity with the requirements of the statute. No other notice was contemplated or required by the statute; and when it was made to appear by affidavit that the statutory or constructive notice had been properly given, the court had jurisdiction to hear and determine the matters arising under the petition, if it had jurisdiction of the subject-matter, whether the appellant had or had not any notice whatever of the proposed drainage. We repeat, that if the Marshall Circuit Court had jurisdiction of the subject-matter of the proposed drainage, as described in the complaint in this case, in so far as the proposed drain or ditch was to be excavated longitudinally in and through the appellant's right of way, then we would be bound to hold that the allegation of appellant, that it never had any notice whatever of the proposed drainage, was not sufficient to overcome the presumption that the statutory notice had

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been properly given. Before we conclude this opinion, we will recur to and consider the question of the court's jurisdiction of the subject-matter of the proposed drainage, as described in appellant's complaint.

2 and 3. The second question presented by appellant's counsel, in argument, is that the statute, under which the drainage proceedings described in its complaint were had, is in contravention of certain sections of the bill of rights in our State Constitution; and the third question, presented in like manner, is that the aforesaid statute is repugnant to section 1 of article 14 of the Constitution of the United States. These two questions, if they could properly be regarded as open questions in this State, might well be considered together, for the difference between the sections of our bill of rights and section 1 of article 14 of the Federal Constitution, upon the point to which they are cited, is one of verbiage and phraseology rather than of substance. But the statute in question and prior drainage laws have been so long and so often recognized, acted upon and upheld as valid legislation, in and by the decisions of this court, that we can not now entertain or, at least, express even a doubt as to the constitutionality of such enactments. *Chambers v. Kyle*, 67 Ind. 206; *Deisner v. Simpson*, 72 Ind. 435; *Coolman v. Fleming*, 82 Ind. 117; *Anderson v. Baker*, 98 Ind. 587. The question of the supposed unconstitutionality of the statute has been ably discussed by appellant's counsel, but we must decline to consider it, as we think it is settled by our decisions that the law in question is a valid and constitutional exercise of legislative power.

4. The fourth and last question presented by appellant's counsel, in argument, is that it was not competent in law for the court, or the commissioners of drainage acting by the court's authority and under its direction, to appropriate to the use of the ditch or drain appellant's right of way, which it had acquired for its necessary use in its service to the public; especially so, as it appeared in this case, that the new use would be destructive of the old use, and was not neces-

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sary. In other words, counsel say it is not competent under a general legislative grant of power to appropriate for one public use what is already applied to another public use, when the latter use would be destroyed by the former. This question involves, we think, the question before referred to of the court's jurisdiction of the subject-matter of the proposed drainage, in so far as the same extended longitudinally in, along and through the appellant's right of way. The allegations of the complaint applicable to the question under consideration, which are admitted to be true as the case is now presented, were in substance as follows: That by proceedings duly had under the laws of this State and by purchase, appellant acquired a strip of ground, six rods wide, extending through sections 25 and 26, in township 35 north, of range 2 east, in North township, in Marshall county, for the construction and maintenance of a railroad track, upon which passengers and freight were carried and the usual railroad traffic was conducted; that it is essential appellant should have the exclusive possession and control of its entire right of way through the aforesaid sections, for the proper and safe maintenance and repairs of its road-bed, maintenance of fences between its track and the adjacent lands, which by law it was bound to maintain, as well as for the construction of a second track, side-tracks, switches and station and depot grounds, whenever the same might be demanded by increase of business; and that the appellees North and Kimball, claiming to act under the order of the court, had proceeded upon appellant's right of way, in the aforesaid sections, to excavate a ditch along such right of way a distance of about one mile.

We are of opinion that the Marshall Circuit Court, notwithstanding the broad and comprehensive terms of the statute, had no jurisdiction, power or authority to declare the proposed ditch or drain established upon, along and longitudinally through appellant's right of way, or to direct the commissioner of drainage to make or construct such ditch or

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drain. The law seems to be well settled that lands once taken for a public use can not, under general laws, without an express act of the Legislature for that purpose, be appropriated by proceedings *in invitum* to a different public use. The Legislature, as the supreme and sovereign power of the State, may doubtless interfere with property held by a corporation for one purpose and apply it to another; but the legislative intention so to do must be stated in clear and express terms, or must appear from necessary implication. *In re City of Buffalo*, 68 N. Y. 167; *In re Boston & A. R. R. Co.*, 53 N. Y. 574; *Prospect Park, etc., R. R. Co. v. Williamson*, 91 N. Y. 552.

A legislative intent to subject lands devoted to a public use, already in exercise, to one which might thereafter arise, will not be implied from a grant of power, made in general terms, as in our drainage laws, without special reference to an existing necessity for the subsequent use, where, as in this case, it appears that both uses can not stand together, and the latter, if exercised, must greatly endanger, if it do not destroy, the exercise of the former use. *Mills Em. Domain*, section 45, *et seq.*, and authorities cited; *Hickok v. Hine*, 23 Ohio St. 523; *Crossley v. O'Brien*, 24 Ind. 325; *Pierce Railroads*, p. 156; 1 Redf. Law of Railways, p. 244, and *note*.

There is nothing in the *first* and *third* grounds of appellees' demurrer to the appellant's complaint. The court erred, we think, in sustaining the demurrers to the complaint, and from this decision it follows logically that the court also erred in sustaining appellees' motions to dissolve the temporary injunction theretofore granted herein.

The judgment is reversed, with costs, and the cause is remanded, with instructions to overrule the demurrers to the complaint and the motions to dissolve the temporary injunction, etc.

Filed Nov. 4, 1885.

The Board of Comm'rs of Rush Co. v. The State, *ex rel.* Hord, Att'y Gen'l.

No. 12,333.

THE BOARD OF COMMISSIONERS OF RUSH COUNTY v. THE
STATE, EX REL. HORD, ATTORNEY GENERAL.

108 497
149 401

108 497
157 457

SCHOOL FUND.—*Expense of Management.*—The Constitution requires the counties to bear the expense of managing the school fund.

SAME.—*Action Against County.*—An action will lie against a county for money paid out of the school fund to its officers for managing such fund.

SAME.—*Direct Trust.*—*Statute of Limitations.*—The county in receiving and disbursing the school fund acts as the trustee of a direct trust, and against such a trust the defence of the statute of limitations can not be interposed.

SAME.—*Settlement Between Board of Commissioners and County Officer Does not Conclude State.*—A settlement between the board of commissioners and a county auditor, or other county officer, does not conclude the State from maintaining an action to recover school funds unlawfully paid to an officer by the board.

FORMER ADJUDICATION.—*Different Causes of Action.*—There can be no former adjudication where the causes of action are different.

From the Rush Circuit Court.

B. L. Smith and *W. J. Henley*, for appellant.

F. T. Hord, Attorney General, for the State.

ELLIOTT, J.—This action was instituted by the Attorney General to recover from the county of Rush divers sums of money which from time to time it had paid for collecting and disbursing the school fund.

The Constitution requires the counties to bear the expense of protecting, investing and collecting the school fund. Whatever sums they pay to their officers for managing the fund they must account for to the State. *State, ex rel., v. Board, etc.*, 90 Ind. 359; *Vanarsdall v. State, ex rel.*, 65 Ind. 176, see p. 184. For money paid out of the school fund to its officers for managing the school funds, an action will lie against the county.

The answer of the appellant, interposing the statute of limitations as a defence, is not good. The county, in receiv-

The Board of Comm'rs of Rush Co. v. The State, *ex rel.* Hord, Att'y Gen'l.

ing and disbursing school funds, acts as a trustee, and it is a familiar rule that the trustee of a direct trust, when sued by the beneficiary, can not successfully interpose the defence of the statute of limitations. The trust in this case is a direct one, for the fund is set apart by positive law as a trust fund. It is not merely an implied trust, but it is a trust created for a high and important purpose. If it were a mere implied trust, then the statute of limitations would be available as a defence. *Newsom v. Board, etc., post*, p. 526. It is, however, more than a trust by implication, for it is one expressly created and carefully guarded by law. In *State, ex rel., v. Board, etc., supra*, it was held, as we now hold, that against such a trust the defence of the statute of limitations can not be successfully interposed. That case is precisely like the present.

The fund set apart for the common schools is a trust fund of a class and character that can not be diverted, directly or indirectly, to any other purpose than that to which it is devoted by express law. *State, ex rel., v. Board, etc., supra*; *People v. Board of Education*, 13 Barb. 400; *Collins v. Henderson*, 11 Bush, 74; *City of Hoboken v. Phinney*, 29 N. J. L. 65. As the school fund is expressly made a trust fund, the decision in *Moore v. State, ex rel.*, 55 Ind. 360, is not in point.

A settlement between the board of commissioners and a county auditor, or other county officer, does not conclude the State from maintaining an action to recover school funds unlawfully paid to an officer by the board. Such a settlement does not even conclude the county from maintaining an action against a defaulting or delinquent officer. *Hunt v. State, ex rel.*, 93 Ind. 311.

A claim was filed some years prior to the commencement of this action against the county for money paid to its officers, and a judgment was recovered in that action, but, as the special finding states, "None of the items sued for in the first case are the same as those sued for in this action, and that the

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causes of action are not the same, but different." It is too clear to require discussion that this finding overturns the appellant's argument that there was a former adjudication of the matter in controversy.

Judgment affirmed.

Filed Nov. 5, 1885.

No. 12,113.

VAUGHAN v. GODMAN ET AL.

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| 103 | 499 |
| 140 | 350 |
| 103 | 499 |
| 147 | 118 |

DEED.—*Delivery.*—*Acceptance.*—*Quieting Title.*—*Conveyance of Parent to Infant Child.*—*Presumption.*—Where, in an action by a father against his daughter to set aside a deed and quiet title, the facts undisputed are, that the father, without any money consideration, and without the knowledge of the grantee, conveyed to his daughter, a child six and one-half years old, living with her father, by deed in fee simple, the real estate in controversy, and shortly thereafter caused said deed to be recorded, it will be presumed that the deed was delivered to, and accepted by, the grantee.

PRACTICE.—*Weight of Evidence.*—The Supreme Court will not reverse a judgment upon the weight of the evidence where there is evidence tending to sustain the finding of the lower court.

From the Tippecanoe Circuit Court.

W. C. Wilson, J. H. Adams, J. A. Wilstach and J. N. Wilstach, for appellant.

J. R. Coffroth, H. W. Chase and F. S. Chase, for appellees.

ZOLLARS, J.—We copy from the opinion rendered in this cause upon a former appeal, and reported as *Vaughan v. Godman*, 94 Ind. 191, the following summary of appellant's complaint:

"Appellant was the owner of parts of two lots in the city of Lafayette, which he acquired by purchase and deeds—one in the year 1864 and one in 1865. This property was bought for a family residence, was paid for by appellant out of his earnings, and constituted the whole of his property. In 1859 appellant married Mrs. Shay; she did not at that time, nor

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did she at any time thereafter, own any property. Appellee Catharine was born in 1861; when she was five years old a brother of the mother's deceased husband threatened to sue appellant for a debt of \$500, due him from the deceased husband, which appellant had never, in any manner, obligated himself to pay. At this juncture appellant consulted a distinguished lawyer, and upon his advice, as stated in the complaint, appellant and his wife 'conveyed both said pieces of real estate to their said daughter, said defendant Catharine Vaughan, in order that the said plaintiff and his wife might not be molested with a lawsuit, and that the property might be preserved in the family, without expense of a litigation, by a deed dated October 19th, 1867, without any consideration, except the purpose of preserving the property, and for the expressed consideration of one dollar.' The averments of the complaint in relation to the delivery of the deed are as follows: 'Plaintiff further avers, * * * that said Catharine Vaughan, at the date of said deed, was only of the age of five years; that said deed was never delivered to her; * * * that this plaintiff, without any knowledge on the part of said Catharine Vaughan, took said deed, on the 21st day of October, 1867, to the office of the recorder of said county, and procured and paid for the recording of the same, and on or about the 1st day of November, 1867, obtained the same again from said recorder, and placed the same with his own papers, where it has ever since remained, and has never left his possession, nor been in the possession of said Catharine Vaughan, nor any other person except this plaintiff and his counsel. And the plaintiff further says and expressly avers, that said deed to said Catharine Vaughan was never delivered to her, nor to any person or persons for her; she had no knowledge whatever of said deed at the time it was signed, nor for more than twelve years thereafter, and the title was never accepted by her, nor possession taken by her, nor by any person for her (except the recent possession of said guardian appointed December 29th, 1880, be ac-

counted such possession).’ It is further made to appear by the complaint that appellant occupied the property as a family residence until the death of his wife, and for some time thereafter, and remained in the possession until the appointment of the guardian for Catharine in 1880, paid the taxes, made improvements, collected the rents, etc.”

The prayer of the complaint is that the deed be declared to be a nullity and be cancelled and held for naught, and that a commissioner be appointed to convey the real estate to the plaintiff, Vaughan. Since the action was commenced, the daughter’s name has been changed by marriage.

Citing *Taylor v. McClure*, 28 Ind. 39, *Somers v. Pumphrey*, 24 Ind. 231, *Mallett v. Page*, 8 Ind. 364, *Tallman v. Cooke*, 39 Iowa, 402, and 3 Washb. Real Prop. (4th ed.) 284, we held upon the former appeal, that a deed may be delivered by the grantor having it recorded, if his purpose in so doing is to effectuate a delivery.

Citing the above authorities, and the cases of *Hotchkiss v. Olmstead*, 37 Ind. 74, *Berry v. Anderson*, 22 Ind. 36, *Thatcher v. St. Andrew’s Church*, 37 Mich. 264, *Jones v. Swayze*, 42 N. J. 279, *Gilbert v. North American Fire Ins. Co.*, 23 Wend. 43, *Byars v. Spencer*, 101 Ill. 429, and *Martindale Law of Conv.*, sections 204, 206, 212 and 222, it was further held that if a deed is recorded by the procurement of the grantor, that is, *prima facie*, a delivery, especially when the conveyance is to a minor; that this *prima facie* case may be overthrown by evidence; that the question of delivery is one of fact to be determined upon the evidence; that in all disputes as to whether or not a deed has been delivered, the important inquiry is to ascertain the intent of the grantor in the act, or several acts, which it may be claimed constitute a delivery; that in such inquiry the question is, did he intend to divest himself of title and lodge it in the grantee? And, again, citing some of the above authorities, and *Cecil v. Beaver*, 28 Iowa, 241 (4 Am. R. 174), *Spencer v. Carr*, 45 N. Y. 406 (6 Am. R. 112), *Guard v. Bradley*, 7 Ind. 600, *Squires v.*

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Summers, 85 Ind. 252, *Bryan v. Wash*, 7 Ill. 557, *Reed v. Douthit*, 62 Ill. 348, *Rivard v. Walker*, 39 Ill. 413, and 3 Washb. Real Prop. (4th ed.), p. 284, it was held that where the grant is to a child, by way of a gift, and is beneficial in effect, acceptance of the deed will be presumed, although the deed may be retained in the possession of the grantor.

In accordance with the holdings above stated, it was further held, reversing the judgment, that disregarding some of the averments in the complaint, because they are statements of evidentiary facts, rather than of the ultimate fact, the repeated allegation, that the deed was not delivered, rendered the complaint good as against the demurrer directed against it, although the grantor had caused the deed to be recorded. These rulings are supported by the subsequent cases of *Jones v. Loveless*, 99 Ind. 317, *Fitzgerald v. Goff*, 99 Ind. 28, and *Bremmerman v. Jennings*, 101 Ind. 253.

Since the reversal upon the former appeal, the case has been tried below; the relief asked by appellant was denied, and judgment was rendered against him for costs. The overruling of appellant's motion for a new trial is the only assigned error. That motion raises the single question of the sufficiency of the evidence to sustain the finding and judgment of the trial court. That appellant is the father of appellee, Catharine Godman; that in October, 1867, without any money consideration, he and his then living wife, who was her mother, signed and acknowledged a deed, which upon its face is a deed of conveyance in fee simple to said appellee of the real estate in dispute; that appellant shortly thereafter caused the deed to be recorded; that at that time appellee was about six and one-half years old, and lived with her parents, are facts about which there is no dispute.

Upon these undisputed facts the following presumptions, if none other, arise:

First. That the deed was delivered.

Second. That it was accepted by the grantee.

These presumptions make a *prima facie* case in favor of

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appellee and against appellant. He can not recover in this action until he meets and overthrows this *prima facie* case against him.

The substance of appellant's testimony is as follows: He purchased the real estate in controversy, paid for it with his own means, made improvements upon it, paid the taxes upon it, and possessed and controlled it until 1880, when appellee's then guardian deprived him of the possession. In 1867 his wife, who afterwards died, was an invalid. About that time he received a letter from a brother of his wife's deceased husband, demanding that he, appellant, should pay a debt of \$500 which the deceased husband owed. He consulted a distinguished lawyer, now dead, and was advised by him, that while the claim might not be collectible from him by law, he had better convey the real estate to the daughter, and thus save the expense of a litigation. For the purpose and intention of thus avoiding the expense of a litigation and the payment of the claim made upon him, and to save the property for himself, he and his wife executed the deed, and he had it recorded, and has always thought that the daughter had no claim in or to the property. At the time the deed was made, the daughter was about six and one-half years old. She paid nothing, and knew nothing of the deed until she was eighteen or nineteen years old. About this time, without a demand from him, she said that she would deed the property to him when she became of age. Subsequently, she asserted that the property was hers. After the deed was recorded, he kept it in a trunk a part of the time, but until the death of his wife, in 1872, he kept it in a drawer, to which his wife had access.

The substance of appellee Catharine's testimony is as follows: She was twenty-three years old in March, 1884, and was about twelve years old when her mother died. The family lived on and in the property in dispute for two years preceding her mother's death. Shortly before her death, the mother explained the deed to her, and told her that the property was hers, that it would make a home for her, and that

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she should always keep it. The father, appellant, was often present when these conversations about the deed and property occurred; he, too, said that the property had been deeded to her and was hers. The deed was kept in a bureau drawer of which the mother had charge. Appellee had access to the drawer, and had read the deed before her mother's death. One Mr. McGrath was appointed appellee's guardian about the year 1880.

Another credible witness testified, that when the appointment of McGrath was about to be made, appellant desired to be appointed, and said that if appellee would consent to his appointment, she might keep the property; that he intended she should have it, but she had acted so, and treated him so, that he was going to take it from her.

We have here a question, not upon the sufficiency of averments in the complaint, as upon the former appeal, but a question upon the sufficiency of the evidence. It is clear that upon the above evidence we could not reverse the finding and judgment of the trial court, without the violation of the well settled rule, that this court will not reverse a judgment upon the weight of the evidence, where it tends to sustain the finding and judgment of the court below. The reason of that rule has been so often stated that we need not re-state it here. We can not say that appellant has met and overthrown the presumption that confronted him upon the undisputed facts at the outstart. It is clear that appellee Catharine has never declined to accept the conveyance. On the other hand, her entire course of conduct has been in keeping with the presumption that she accepted the deed and grant made to her. Appellant's testimony, too, supports the presumption that by procuring the deed to be recorded, he meant to deliver it, and lodge the legal title to the property in appellee Catharine. His purpose in making and recording the deed manifestly was, so far as he could in that manner, to place the property beyond the reach of the person making the unjust demand upon him.

The Western Union Telegraph Company v. Harding.

In the finding and judgment of the court below is necessarily included the finding that the deed was delivered and accepted. We can not disturb that finding, and must deal with the case upon the assumption that the deed, absolute in form, was delivered and accepted. When that conclusion is reached, the case is disposed of.

It may be very unfortunate for appellant that he made the deed. The case appears to be one of hardship to him, and of ingratitude upon the part of the daughter. The deed, however, was voluntarily executed, and there is nothing in the case, as made upon the trial, that would justify or authorize a court to overthrow it. See *Mallett v. Page*, 8 Ind. 364; *Cecil v. Beaver*, 28 Iowa, 241; *Rivard v. Walker*, 39 Ill. 413; *Gage v. Gage*, 36 Mich. 229; *Lochenour v. Lochenour*, 61 Ind. 595.

The judgment is affirmed, with costs.

Filed Nov. 6, 1885.

No. 12,140.

THE WESTERN UNION TELEGRAPH COMPANY v. HARDING.

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| 103 | 606 |
| 159 | 168 |

TELEGRAPH COMPANY.—Power to Regulate Office Hours.—Under section 4176, R. S. 1881, a telegraph company may regulate, reasonably, its office hours according to the requirements of the business at the various points where it holds itself out for public service.

SAME.—Failure to Transmit.—Statutory Penalty.—The penalty for failing to seasonably transmit a message is not incurred unless there is a failure to receive and transmit during the usual office hours, both at the point where the message is received and that to which it is transmitted.

SAME.—Information to Agents as to Office Hours at Different Points.—To avoid the statutory penalty, it is not necessary that a telegraph company should keep its agents at all points informed concerning the office hours at all other points, so that the sender of a message may be voluntarily apprised of any probable delay in its transmission on that account. But it seems that a case might arise where the company would be bound to ascertain and disclose its inability to transmit the message speedily or be liable in damages.

Howk, J., dissents.

From the Fountain Circuit Court.

The Western Union Telegraph Company v. Harding.

J. E. McDonald, J. M. Butler, A. L. Mason and H. L. Gordon, for appellant.

C. M. McCabe, for appellee.

MITCHELL, C. J.—This suit was brought by Charles N. Harding against the Western Union Telegraph Company to recover the statutory penalty for negligently failing to transmit a message received by it from the plaintiff.

The complaint charges that the message was delivered to the defendant's agent, at its office in Crawfordsville, Indiana, on the 27th day of September, 1884, during usual office hours, to be transmitted to Covington, Indiana, and that payment for transmission had been made according to the regulations of the company. The message set out is of the tenor following :

"To C. M. McCabe, Covington, Ind.

"Can not come to-night. Write us to-morrow. Alls well.

"C. N. HARDING."

It is charged that the defendant's agent, at Covington, received the message in the evening of the day on which it was left for transmission, but that he neglected to deliver it until after noon of the day following.

With the general denial, the defendant filed a special answer. In this it is averred that the message was delivered to its agent at Crawfordsville at ten minutes after seven o'clock P. M., on September 27th, 1884, that being Saturday, and that it was promptly transmitted and received off the wire at Covington by the night operator of the Indiana, Bloomington and Western Railroad Company at twenty-five minutes past seven o'clock P. M. of the same day.

The answer alleges further that the defendant's office hours at Covington are from seven o'clock A. M. to seven o'clock P. M. That between those hours its office at that point is open to the public, and its agent and messenger are on duty to receive, deliver and transmit messages, and that it has no night operator or messenger in its employ at Covington to

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send or receive messages for the public after regular office hours; that its agent and messenger there go off duty at seven in the evening, and do not return again for duty until the regular office hour on the day following, and that it does not keep its Covington office open, or hold itself out to the public, to transact business there at any other time than between the hours mentioned; that all messages sent from, or received at, that office except during regular office hours, are sent and received by the night operator of the railroad company, or by some other person who is neither the agent, nor in the employ of the defendant. It is averred that the message sent to the plaintiff was received at Covington by the night operator of the railroad after the defendant's regular office hours, and that it was not so received by any person who was in its employ; that its office was not kept open on Sundays for the purpose of transacting business with the public, but, as was his custom, the defendant's messenger went to the office at nine o'clock on the Sunday morning after the message was so received, and, discovering it there, he went out to deliver it to the person to whom it was addressed, but failed to find him until about noon, when he delivered it. The paragraph closes with an averment that the message was transmitted with impartiality and good faith, and without delay, in the order of time in which it was received, without postponement, etc.

A demurrer was sustained to the second paragraph, and an exception taken. Afterwards the defendant withdrew the general denial, and, refusing to plead further, judgment was rendered for the statutory penalty.

Upon this appeal the question is presented, whether the facts pleaded in the answer constituted a sufficient excuse for the alleged default of the telegraph company?

The defence is predicated upon the fact that, although promptly sent, the message, in its usual course, was not received at Covington within the regular or usual office hours of the company at that point.

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Section 4176, R. S. 1881, provides, in substance, that companies engaged in telegraphing for the public shall, "during the usual office hours, receive dispatches," and, on payment of the usual charge, "transmit the same with impartiality and good faith," in the order of time in which they are received, under penalty, etc.

The statute recognizes the common law right of the company to make reasonable regulations for the transaction of its business. It implies that to a reasonable extent it may prescribe the hours during which it will transact business for and with the public. Obviously, this must include the right to regulate its office hours according to the requirements of the service at the various points where it holds itself out for public service. It can not be implied that because the public service may require that its office hours should include a given time at one point, all other offices or places at which it serves the public must be open and fully equipped for such service an equal length of time. No reasonable requirement would demand this.

The question, then, comes to this, did the defendant incur the statutory penalty by receiving the message at Crawfordsville during its usual office hours there, and failing to transmit it to the person to whom it was addressed, at Covington, at any other than usual office hours at that point?

The reasonable construction of the statute is, that the penalty is incurred by a failure to receive and transmit messages impartially and in good faith during usual office hours. We know as a matter of common knowledge, that the transmission of a communication by telegraph involves necessarily two offices, one at the point at which it is delivered for transmission, and another at that to which it is transmitted. What, then, is meant by usual office hours, as used in the statute?

In construing a penal statute, it must be remembered that the law will intend nothing in favor of the imposition of a penalty until, upon a strict construction, it appears there has

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been a clear violation of the statutory obligation for which the penalty is imposed.

In this view, it seems clear to us, contrary to our first impression, that the penalty is not incurred unless there is a failure to receive and transmit during the usual office hours, both at the point where the message is received and that to which it is to be transmitted. To hold otherwise would involve the telegraph company in the necessity of having its offices open for the reception and delivery of messages at all points an equal length of time.

If the requirements of its business at one point made it necessary to keep its office open twenty-four hours in the day, its usual office hours at such point would be continuous. It would, according to the construction contended for, be compelled to receive messages during usual office hours at that point. If it must transmit them, without delay, to every other point to which they may be directed, or incur the statutory penalty, irrespective of the requirements of its business at other points, then of necessity it must have no offices at all at points where it can not have them open continuously. We do not think this was the purpose of the statute.

The question arises whether the telegraph company should not keep its agents at all points informed concerning the office hours at all other points, so that when a message is presented for transmission, the sender may be apprised of any probable delay which may intervene at the other end. If the question should be as to the mere civil liability of the company for damages, there might a case arise in which such a requirement would be reasonable. Even in such a case we find eminent authority the other way.

In the case of *Given v. Western Union Tel. Co.*, which was an action brought in the circuit court of the United States for the Southern District of Iowa, to recover judgment for delay in the delivery of a message, this question arose. The message, for the non-delivery of which damages were claimed, was addressed to Marshalltown, Iowa, and was delivered to

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defendant at its office in Des Moines, at 9 o'clock P. M. It was not transmitted to Marshalltown until twenty minutes after 8 o'clock A. M. on the next day, for the reason that the office at Marshalltown closed at 9 o'clock P. M. for the night. It was urged by the plaintiff that having received the message at 9 o'clock at Des Moines, and having received full day rate charges for its transmission, the defendant was bound to transmit it to the person addressed at Marshalltown on that night. The defendant responded that the office at Marshalltown closed at 9 o'clock P. M. for the night, and that the message could not be transmitted until the next day, which was done. The question as to the duty of defendant to keep its employees at one office informed as to office hours at every other office very naturally arose upon the issue joined by defendant's answer, and the court was called upon to decide it. In doing so, Mr. Justice MILLER said: "Nor do we see that it is the duty of the Western Union Telegraph Company to keep the employees of every one of its offices in the United States informed of the time when every other office closes for the night. The immense number of these offices all over the United States, the frequent changes among them as to time of closing, and the prodigious volume of a written book on this subject, seem to make this onerous and inconvenient to a degree which forbids it to be treated as a duty to its customers, for neglect of which it must be held liable for damages. There is no more obligation to do this in regard to offices in the same state than those four thousand miles away, for the communication is between them all, and of equal importance." *Given v. Western Union Tel. Co.*, 24 Fed. Rep., p. 119. So, in the case of *Stevenson v. Montreal Tel. Co.*, 16 U. C. Q. B. 530, BURNS, J., said: "Having selected that route, it may be asked, was there any obligation on the part of the defendants to inform him on the 23d of November that the line was then, at the receipt of the message, out of order. I do not see that any such obligation existed. The company were

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bound only to transmit as soon as it could reasonably be done. * * * Therefore it appears to me it is not reasonable to expect that the company is bound, on every occasion when a person desires a communication to be forwarded, to inform him that possibly the message may not be forwarded for some minutes or some hours. It is more reasonable, I think, to cast the burthen or responsibility upon the person presenting messages to be forwarded, of inquiring whether they can be sent within any particular time, or of giving information of the particular importance it may be to the party that the message should be forwarded without delay."

It may be well to state that the members of this court are not all agreed as to the validity of the reasoning contained in the foregoing opinions, and are not, therefore, to be deemed as committing themselves to them as authority.

Whatever we might conclude, however, as to the doctrine of the cases cited when applied to actions for the recovery of civil damages, we are satisfied that where a penalty is sought to be enforced their principles should be applied.

It might well be that in a case where a message was delivered, which showed upon its face the importance of speedy transmission, and other means of making the communication were available to the sender, which might be resorted to if he was informed that the one chosen was ineffectual, or his conduct might otherwise be materially controlled thereby, the company would be bound at its peril to ascertain and disclose its inability to serve him, or render itself liable to respond in damages.

The rule which governs in the case of a passenger who purchases a ticket entitling him to passage on a railway train, has some analogy here. In such a case it is settled that it is the duty of the passenger to inquire before embarking upon the train whether it will carry him to the point of his destination. *Ohio, etc., R. W. Co. v. Applewhite*, 52 Ind. 540; *Pittsburgh, etc., R. W. Co. v. Nuzum*, 50 Ind. 141 (19 Am.

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R. 703); *Beauchamp v. International, etc., R. R. Co.*, 9 Am. and Eng. R. R. Cas. 307, and note.

It is argued that the answer does not show but that the defendant's agent or messenger was present at the Covington office when the message was received, and it is said if they were, the company are liable for their failure to deliver the message even though it was after usual office hours. We do not think so. The statutory liability of the company is predicated upon the failure to receive and transmit during usual office hours, and we can not by construction enlarge its operation so as to make it include more than is expressed in its terms.

When it is admitted that the company has the right to prescribe office hours for a given place, and that the message was transmitted promptly according to the usual office hours as prescribed, then, unless it is made to appear that under the circumstances involved, the hours prescribed are unreasonable, penal liability does not attach.

The complaint having averred that the message was delivered at Crawfordsville during usual office hours, and that the agent at Covington failed and neglected to deliver it seasonably, was presumptively sufficient to cast the burden upon the defendant of excusing its apparent default. The assignment that the complaint was not sufficient is, therefore, not well taken.

For the error in sustaining the demurrer to the second answer the judgment is reversed, with costs.

Howk, J., does not concur in this opinion.

Filed Nov. 6, 1885.

 No. 12,184.

ARNOLD v. ENGLEMAN.

MARRIED WOMAN.—*Contract.*—*Coverture.*—Where, to an action on contract against a married woman, she pleads coverture, the plaintiff must reply the facts which show that the contract declared on is one which she had power to execute.

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| 108 | 512 |
| 124 | 167 |
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| 108 | 512 |
| 159 | 165 |

Arnold v. Engleman.

SAME.—Executory Contract.—Statute Construed.—Under section 5115, R. S. 1881, a married woman has general power to make executory contracts except in certain specified cases; and the provision of section 5117, that she may make contracts concerning her separate personal property, is not a limitation upon such general power.

SAME.—Wearing Apparel.—Promissory Notes.—A married woman may purchase wearing apparel for herself, and notes, executed by her for the price which she agreed to pay therefor, are valid, and may be enforced.

From the Huntington Circuit Court.

T. G. Smith, for appellant.

J. B. Kenner and *J. I. Dille*, for appellee.

ELLIOTT, J.—The first and second paragraphs of the appellant's complaint count upon promissory notes executed by the appellee, the third is upon an account for goods sold and delivered to her. The answer of the latter is, in substance, as follows: That she was a married woman at the time the notes were executed and the goods purchased; that she still is a married woman, and that the notes were not given by her in consideration of her separate property, nor for any improvements or benefits to her real or personal property, nor were they given by her in any business, loan or trade carried on by her, nor by any partnership of which she was a member, "but they were given for goods and necessities for herself and family in the way of clothing and wearing apparel, and that the same is the debt of her husband, Christian Engleman, who is the head of the family and the father of the children, who are minors."

To this answer the appellant replied, admitting that the appellee was a married woman, and alleging that "the notes were executed in settlement of her account for dry goods, dress goods and other articles of female apparel suitable to the wants and condition of the defendant, which she purchased" of the appellant's assignor, which goods were charged to her on the books of the assignor, "delivered to her, and used by her;" that the goods were sold, delivered and charged to

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the appellee by the appellant's assignor, "relying solely upon her special promise to pay for the same out of her own separate personal property, and in no way relying upon her husband to pay for the same or any part thereof."

It is proper, and, indeed, necessary for the plaintiff, in a case where coverture is pleaded, to reply the facts which show that the contract declared on is one which the married woman had power to execute. *Cupp v. Campbell*, ante, p. 213. The question here is as to the sufficiency of the facts pleaded to avoid the disability of coverture. We have decided that in cases of married women ability is now the rule and disability the exception. *Rosa v. Prather*, ante, p. 191. This is the only reasonable interpretation of our statute, for its language is broad and comprehensive. Section 5115 provides that "All the legal disabilities of married women to make contracts are hereby abolished, except as herein otherwise provided." This confers a general power to make executory contracts except such as are prohibited by the statute. There is no provision prohibiting married women from purchasing wearing apparel and executing notes for its value. It is true, that in section 5117 it is provided that she may make contracts concerning her separate personal property, but this is merely permissive and cumulative, and is not a limitation upon the general power conferred by the section quoted. It would be a great stretch to affirm that in buying personal property she was not contracting concerning it, and if the provision found in section 5117 stood alone it would be quite doubtful whether a married woman's contract for the purchase of wearing apparel for herself were not valid, but the provisions of section 5115 make it very clear that such contracts are valid and enforceable. The decisions in *Vogel v. Leichner*, 102 Ind. 55, *Rothschild v. Raab*, 93 Ind. 488, and *Wulschner v. Sells*, 87 Ind. 71, support our conclusion.

Our conclusion is that a married woman may purchase wearing apparel for herself, and that notes executed by her

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for the price which she agreed to pay for it, are valid and may be enforced.

Judgment reversed, with instructions to overrule the demurrer to the reply, and to proceed in accordance with this opinion.

Filed Nov. 6, 1885.

No. 11,810.

MEECH v. LAMON.

NEW PROMISE.—*Revival of Debt Discharged by Bankruptcy.*—The promise, by which a debt discharged by bankruptcy proceedings is revived, must be express, clear, distinct and unequivocal, in contradistinction to a promise implied from an acknowledgment of the justness or existence of the debt.

SAME.—A promise, in these words: "I do not intend you shall lose it, I will make it all right," is not a sufficient new promise to revive a debt discharged by bankruptcy. *Hubbard v. Farrell*, 87 Ind. 215, criticised.

From the Grant Circuit Court.

B. M. Cobb and *C. W. Watkins*, for appellant.

J. B. Kenner, *J. I. Dille* and *L. M. Ninde*, for appellee.

NIBLACK, J.—Prior to 1873 one Corey owned a tract of land in Huntington county, and while such owner he executed a mortgage upon it to one Haynes. Afterwards William H. Meech, the appellant in this cause, became the owner of the same tract of land as the remote grantee of Corey. During the year 1873 Meech sold and by warranty deed conveyed the land to William Lamon, the appellee. In December, 1877, Haynes commenced an action in the Huntington Circuit Court against Lamon to foreclose his mortgage, and thereafter obtained a decree of foreclosure and an order for the sale of the land. In March, 1879, the land was sold at sheriff's sale, and Haynes became the purchaser, receiving a sheriff's deed therefor after the expiration of a year from the time of his purchase.

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This action was commenced by Lamon against Meech in October, 1881, for a breach of the covenants contained in the latter's deed.

Meech answered that on the 30th day of April, 1878, he was adjudged a bankrupt, and on the 31st day of December, 1879, had received his final discharge in bankruptcy.

Lamon replied an express promise by Meech to pay the damages he had sustained after the latter's discharge in bankruptcy.

A jury returned a general verdict in favor of Lamon, and answered special interrogatories as follows:

"*First.* When was the new promise made, if any, to pay the indebtedness in suit? Answer. Promise made after defendant filed his petition in bankruptcy.

"*Second.* What was the precise language of the new promise? Answer. 'I do not intend you shall lose it; I will make it all right.'

"*Third.* To whom were the words spoken? Answer. They were spoken to the plaintiff in the presence of L. P. Milligan."

The bill of exceptions shows that these interrogatories were properly submitted to the jury by the court, and that is sufficient to establish the fact here that they were so submitted.

Meech moved for judgment in his favor upon the answers to the special interrogatories, notwithstanding the general verdict, but his motion was overruled. He then moved for a new trial upon the ground, amongst others, that the evidence was insufficient to sustain the verdict, but that motion was also denied.

In the case of *Shockey v. Mills*, 71 Ind. 288 (36 Am. R. 196), this court held, in general terms, that the promise by which a discharged debt is revived must be clear, distinct, and unequivocal, as well as certain and unambiguous; that there must be an expression by the discharged debtor of a clear intention to *bind* himself to pay the debt; that the expression of an intention to pay the debt is not sufficient; that

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there must be an actual promise before the debtor is bound; that an intention is but the purpose which a man forms in his own mind; that a promise is an express undertaking or agreement to carry the purpose thus formed into effect, and that a promise to revive a discharged debt must be express, in contradistinction to a promise implied from an acknowledgment of the justness or existence of the debt.

In the case of *Allen & Co. v. Ferguson*, 18 Wall. 1, the facts were, that Ferguson, who was a citizen of the State of Arkansas, had previously to the 7th day of January, 1868, filed his petition in bankruptcy, and on that day, which was while the proceedings were pending upon his petition, he wrote to Allen & Co., the holders of a promissory note executed by him, a letter giving a statement of his business affairs, and of the causes which had led to his applying for the benefit of the bankrupt act. In that letter he said: "Be satisfied; all will be right. I intend to pay all my just debts, if money can be made out of hired labor. Security debt I can not pay." Adding in a postscript: "All will be right betwixt me and my just creditors." Ferguson in due time received his discharge in bankruptcy. Allen & Co. afterwards sued him in the circuit court for the Eastern District of Arkansas upon the promissory note which they held against him. Ferguson appeared and pleaded his discharge in bankruptcy in bar of the action. Allen & Co. replied a new promise in writing, setting out and relying upon Ferguson's letter of January 7th, 1868, above referred to, as containing and amounting to such a new promise.

A demurrer was sustained to the replication, and, upon an appeal to the Supreme Court of the United States, it was held that the debt was not revived by Ferguson's letter; that the supposed promise contained in it was not sufficiently clear, distinct and unequivocal to operate as a revival of the debt. The doctrine of this case is fully sustained by *Blumenstiel Bankruptcy*, 552, and by *Bump Bankruptcy*, 748, and the cases respectively cited by those authors.

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We think the general purport of the assurances given by Meech to Lamon in this case were no stronger than those given by Ferguson to Allen & Co., and are hence of the opinion that the circuit court erred in refusing to render judgment in favor of Meech, notwithstanding the general verdict. If the case rested here primarily upon the refusal of the circuit court to grant a new trial, we would feel constrained to hold that the verdict was not sustained by the evidence. The finding as to the exact words which constituted the supposed new promise did not embrace all the words uttered by Meech at the time to which the finding referred, and which had reference to the amount of purchase-money which Lamon had paid for the land.

The evidence showed that Meech added to the words quoted in the finding, "But I can't do anything now," and these additional words served to modify and to limit the import of those which immediately preceded them. But as Meech became entitled to a judgment in his favor on the answers to the special interrogatories, there is no sufficient reason for requiring him to incur the hazard of a new trial.

The judgment is reversed with costs, and the cause is remanded with instructions to the court below to enter judgment in favor of Meech upon the answers to the special interrogatories notwithstanding the general verdict.

Filed May 26, 1885.

ON PETITION FOR A REHEARING.

NIBLACK, J.—A petition for a rehearing has been filed on behalf of the appellee, controverting the conclusion reached by us at the former hearing, and insisting that both the arguments used and the inferences drawn in support of that conclusion are against the weight of authority, and especially inconsistent with the doctrine of the recent case of *Hubbard v. Farrell*, 87 Ind. 215.

Upon a recurrence to, and a further examination of, the the case of *Hubbard v. Farrell*, *supra*, we feel constrained to

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admit that the doctrine of that case does not support the conclusion at which we arrived in this case, and that the inconsistency between the two cases is of a character which ought not to be perpetuated by further inadvertence on our part.

As a result of a further examination of both cases, we feel further constrained to hold that the case of *Hubbard v. Farrell*, in question, is not in full accord with the best approved cases on the subject of the revival of debts discharged by proceedings in bankruptcy, and is consequently a case which ought not to be closely followed as a precedent in every point ruled upon by it. It recognizes too liberal a rule in the construction of supposed promises relied on for the revival of debts against a discharged bankrupt.

The original opinion in this case has the further support of the recent and well considered case of *Elwell v. Cumner*, 136 Mass. 102, and is, we feel reassured, in harmony with the general current of the authorities bearing upon the same subject.

We are requested by counsel for the appellee, in the event that we still adhere to the opinion that the judgment in this case ought to be reversed, that we will reverse it upon the evidence, and remand the cause for a new trial so as to afford the parties another and better opportunity of contesting the matters in issue between them at the former trial.

The appellee presumably opposed the granting of a new trial in the court below. He is consequently not now in a position which entitles him to insist that the cause ought to be remanded for a new trial. Besides, there is nothing in the record which gives assurance that a new trial would probably, and at the same time rightfully, reach a result different from that which we have ordered to be consummated upon the answers to the interrogatories accompanying the general verdict.

The petition for a rehearing is overruled.

Filed Nov. 5, 1885.

The Chicago and Atlantic Railway Company v. Derkes et al.

No. 11,370.

THE CHICAGO AND ATLANTIC RAILWAY COMPANY v.,
DERKES ET AL.

CONTRACT.—*Acceptance.*—*Performance.*—*Consideration.*—*Mutuality.*—Where a contract is signed by one only of the contracting parties, but is accepted by the other party, and affirmative acts constituting the consideration thereof are performed by the latter, it is the mutual and binding contract of both.

RAILROAD.—*Contract.*—*Consideration.*—Where parties, in consideration of the benefits which will accrue to them by the construction of a railroad through a certain county and town, bind themselves in a sum sufficient to pay for the right of way across the county, they can not, after the road is so constructed, claim want or inadequacy of consideration to defeat the contract.

SAME.—*Ultra Vires.*—One who has received from a corporation the full consideration of his agreement to pay money, can not avail himself of the objection that the contract is *ultra vires*.

From the Adams Circuit Court.

J. S. Slick and *W. O. Johnson*, for appellant.

D. Studabaker, *R. S. Peterson*, *E. A. Huffman*, *J. T. France*,
W. J. Vesey and *J. T. Merryman*, for appellees.

Howk, J.—The error assigned by the appellant Railway Company, the plaintiff below, upon the record of this cause, is this: "The court erred in sustaining the demurrer of appellees to the first, second, fifth, sixth, seventh and eighth paragraphs of appellant's complaint, and to each of such paragraphs separately and severally."

As to each of such paragraphs of complaint, the only ground of demurrer assigned by the appellees was that it did not state facts sufficient to constitute a cause of action. Afterwards, and before the filing of the subsequent paragraphs, the record shows that the appellant dismissed its third and fourth paragraphs of complaint.

The suit was against the appellee Derkes, and thirty-two other defendants, all of whom are named as appellees in this court. Each of the paragraphs of complaint, remaining in

108 520
143 632
103 520
149 157

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the record after the dismissal as aforesaid of the third and fourth paragraphs, counted upon a written instrument executed, as alleged by each and all of the appellees, a copy of which instrument was filed with and made part of each paragraph of complaint. Omitting the names of the appellees subscribed thereto, this written instrument was in the words and figures following, to wit:

“In consideration of the benefits that will accrue to us in the location and construction of the Chicago and Atlantic Railway through the county of Adams, in the State of Indiana, by way of and through the town of Decatur, in said Adams county, in the State of Indiana, we whose names are hereto attached, hereby acknowledge ourselves bound unto the Chicago and Atlantic Railroad Company in a sum sufficient to pay for the right of way across said Adams county, as mentioned aforesaid, this bond to include the right of way already contracted for and that hereafter to be contracted for, or appropriated; this bond, however, not to include switches or depot grounds, for all of which we jointly bind ourselves: *Provided*, always, that this instrument is not to be binding, unless signed by at least thirty responsible citizens of said Adams county.

“In witness whereof we have hereunto set our hands and seals this 11th day of August, 1881.”

In the first paragraph of its complaint the appellant alleged that it was a corporation, organized under the laws of this State, and that on the 11th day of August, 1881, and prior thereto, it was contemplating the construction of a railroad through the State of Indiana to Marion, in the State of Ohio, but had not then determined whether or not the line so contemplated should pass through the town of Decatur, in Adams county, Indiana, or some point south thereof; that for the purpose of securing the location, construction and operation of such railroad through Adams county, and to and through the town of Decatur, so that it would become a station on such line, the appellees then and since citizens of such county,

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and each owners of real and personal property in the county which would be benefited by the construction of such road, executed to the appellant their bond, a copy of which was made part of such paragraph; that such bond was duly signed by more than thirty responsible citizens of Adams county prior to its delivery to appellant; that, relying upon such bond, and being induced thereby, appellant constructed its railroad through Adams county, making the town of Decatur a point on its line, at a cost greater than it would have incurred had it adopted a line south thereof, and, for that purpose, was compelled to and did procure the right of way through Adams county as cheaply as the same could be reasonably procured; that the necessary cost of such right of way through Adams county, exclusive of switches and depot grounds, paid by appellant up to July 30th, 1883, was the sum of \$9,131.95, all of which sum was necessarily paid at different times to the various land-owners through whose lands such railroad passed in Adams county, and for a more specific statement of persons, amounts and dates of such payments, reference was made to exhibit "B," filed with and made part of such paragraph of complaint; that the sums so paid by appellant for the purpose of procuring such right of way, with interest thereon from dates of several payments, amounted to \$12,000, no part of which had ever been paid by appellees, or either of them, and the whole of such sum, with interest, was then due; that relying upon the obligation of such bond, appellant necessarily paid out such sum of money for such right of way, and located, constructed and fully equipped its railway thereon, through the county of Adams, by way of and through the town of Decatur therein, making it a point and station upon such line; that by means of the premises, an action had accrued to appellant to recover of the appellees the aforesaid sum of money; and that, although appellant had duly demanded such sum of money of the appellees, yet they had hitherto wholly failed, neglected and refused to pay the same. Wherefore, etc.

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The second, fifth, sixth, seventh and eighth paragraphs of the complaint each state, substantially, the same facts, in different language and phraseology, as those stated in the first paragraph, and additional facts are alleged in some of those paragraphs. But these additional facts are not material to the questions we are required to consider and decide in this case, and need not, therefore, be further noticed.

We learn from the briefs of counsel that the appellees' demurrers to the several paragraphs of complaint, remaining in the record, were sustained by the circuit court upon two grounds, namely:

First. Because of the apparent want of mutuality in the contract or bond sued on; and,

Second. Because the bond or contract in suit was not such an one as the appellant was lawfully empowered to make, but was *ultra vires*, and void.

The first of these objections to the contract or bond sued upon, namely, the want of mutuality therein, is certainly not well taken as to any one of the paragraphs of appellant's complaint, upon the facts therein stated. The contract or bond, when it was first executed, was what is sometimes called an unilateral contract, or a proposition merely from the appellees to the appellant. But when, as shown by the facts stated in each paragraph of complaint, such contract, bond or proposition, after its delivery by the appellees, was accepted by the appellant, and the affirmative acts on its part, called for and constituting the consideration of such contract, bond or proposition, were fully done, kept and performed by appellant, the appellees can not be heard to claim there is any want of mutuality in the instrument. So far as that question is concerned, the affirmative acts of the appellant done and performed, as alleged, upon the faith of such contract or bond, made it thenceforward the mutual, valid and binding contract of each and all of the contracting parties. This is settled by many decisions of this court. *Street v. Chapman*, 29

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Ind. 142; *Smith v. Hollett*, 34 Ind. 519; *Fairbanks v. Meyers*, 98 Ind. 92; *Herrman v. Babcock*, *ante*, p. 461.

Under the facts stated in each of the paragraphs of complaint, admitted to be true as the case is now presented, the appellees can not say that the contract or bond in suit is not supported by a sufficient consideration. The bond itself recites the consideration upon which the appellees bind themselves to pay for appellant's right of way across Adams county; and the averments of each paragraph of complaint show that the appellant had done and performed every act and thing stipulated for, in such bond, by the appellees, in order to secure to them the benefits in consideration of which they executed the bond. It is shown in each paragraph of the complaint, that, by and through the affirmative acts of the appellant upon its faith in the bond sued on, the appellees received all the consideration they stipulated for; and, in such case, they are in no position to successfully claim either that they received no consideration, or that the consideration was inadequate to support the bond. Where parties get all the consideration they voluntarily and knowingly contract for, it is well settled that they will not be allowed to say they received no consideration. *Baker v. Roberts*, 14 Ind. 552; *Smock v. Pierson*, 68 Ind. 405 (34 Am. R. 269); *Williamson v. Hitner*, 79 Ind. 233; *Shade v. Creviston*, 93 Ind. 591. The rule is almost elementary, that where parties get all the consideration they bargained for, they can not be heard to complain of the want or inadequacy of the consideration.

2. But it is claimed that the contract or bond in suit was not such an one as the appellant railway company was authorized by law to accept and become a party to, but that it was *ultra vires* and void. Upon the facts stated in each paragraph of complaint, and admitted to be true by appellees' demurrers, we are not favorably impressed with their position. The appellees admit, as the case is presented here, that they executed to the appellant the bond or contract sued

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upon, and that the appellant relying upon such bond or contract, and believing that appellees would do what they bound themselves to do, located and constructed its line of railway through Adams county, by way of and through the town of Decatur. After they have thus obtained from appellant all that they bargained for, they seek to escape liability on their bond or contract upon the ground that the appellant was not authorized by law to become a party thereto, and that, as to it, such bond or contract was *ultra vires* and void. Without deciding whether or not it was within the corporate power of the railway company to become a party to such bond or contract, we are clearly of the opinion that, after full performance by the company of the stipulations of such bond or contract, on its part to be done and performed, and after the appellees have received in full the benefits they bargained for, they can not be permitted to escape or avoid the obligation of their contract, upon the ground that the company had possibly exceeded its corporate power, or that such contract, as to it, was possibly *ultra vires* and void. This question was before this court in *State Board, etc., v. Citizens Street R. W. Co.*, 47 Ind. 407 (17 Am. R. 702), where the railway company sought to escape liability on its contract to pay money, upon the ground that the contract was *ultra vires* and void. The court there said: "It is not claimed in the case under consideration that there was any statute by which the street railway company was prohibited from entering into the contract in question, or, in other words, that in making the contract that company violated any statute by which the act was prohibited. All that is claimed is, that there was a want of power on the part of the corporation to bind itself by the contract. It is fully shown on the part of the plaintiff, that the State Board of Agriculture performed the contract on its part. The street railway company has thus received the benefits and advantages of the contract, but seeks to avoid paying the consideration promised, because it had not the legal power to contract for the benefits which it has actually received. In our

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opinion, the street railway company is not at liberty to assume this position." To the same effect, substantially, are the following cases: *Sturgeon v. Board, etc.*, 65 Ind. 302; *Poock v. Lafayette Building Ass'n*, 71 Ind. 357; *Bicknell v. Widner School Tp.*, 73 Ind. 501.

In *Whitney Arms Co. v. Barlow*, 63 N. Y. 62 (20 Am. R. 504), the court say: "The plea of *ultra vires* should not as a general rule prevail, whether interposed for or against a corporation, when it would not advance justice, but on the contrary would accomplish a legal wrong. * * * One who has received from a corporation the full consideration of his engagement to pay money, either in services or property, can not avail himself of the objection that the contract thus fully performed by the corporation was *ultra vires*, or not within its chartered privileges and powers. It would be contrary to the first principles of equity to allow such a defence to prevail in an action by the corporation." This language, we think, is forcibly applicable to the case in hand, and meets our full approval. See, also, *Pierce Railroads*, p. 515, *et seq.*, and *Green's Brice's Ultra Vires*, p. 729, n. a.

Our conclusion is, that the court erred in sustaining appellees' demurrers to each of the paragraphs of appellant's complaint.

The judgment is reversed with costs, and the cause is remanded with instructions to overrule the demurrers to each paragraph of complaint, and for further proceedings not inconsistent with this opinion.

Filed Nov. 6, 1885.

No. 12,188.

NEWSOM v. THE BOARD OF COMMISSIONERS OF BARTHOLOMEW COUNTY.

STATUTE OF LIMITATIONS.—*Money Received by Public Officers.—Trusts.*—The mere receipt of money under claim and color of right by public officers, does not constitute them trustees in such a sense as to bar the defence of the statute of limitations.

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Newsom v. The Board of Commissioners of Bartholomew County.

SAME.—*Taxes Illegally Collected.*—An ordinary action may be maintained to recover taxes illegally assessed and collected.

SAME.—*When Statute of Limitations a Valid Defence.*—Where money can be recovered in an ordinary action, the statute of limitations is a valid defence.

SAME.—*Can not be Made to Direct Trusts.—Equity.*—It is only to direct trusts, exclusively cognizable by courts of equity, that the defence of the statute of limitations can not be made.

SAME.—*Demand.*—Where a demand is necessary to mature a cause of action, it must be made before the statute of limitations has run, to be available.

SAME.—A demand is not essential to create a cause of action for taxes illegally collected.

From the Bartholomew Circuit Court.

M. Hacker, W. F. Strickland, D. L. Wilson, H. S. Downey,
and *C. Major*, for appellant.

N. R. Keyes, for appellee.

ELLIOTT, J.—The appellant, by his complaint, seeks to recover from the county taxes which it is alleged were wrongfully and illegally exacted from him. The complaint was before us in *Newsom v. Board, etc.*, 92 Ind. 229, where it was held to be good. The questions in the present appeal arise on the issues formed upon answers which plead the statute of limitations.

The position of the appellant is that the money exacted from him for taxes was received in trust for him, and that the statute of limitations can not be made available in a suit against trustees to recover trust funds. This position is not tenable. The mere receipt of money under claim and color of right by public officers does not constitute them trustees in such a sense as to bar the defence of the statute of limitations. Conceding, but not affirming, that a public officer, or corporation, who receives money under color of right, is by that act constituted a trustee, still the trust is not one which can be enforced after the statute of limitations has run. There are trusts which can not be enforced against the defence of the statute, and if there is here any trust at all, it is within

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the class which the statute may be used to defeat. Direct trusts, exclusively cognizable by courts of equity, can not be defeated by the statute, but the present trust, if, indeed, it be a trust in any just sense, is not a direct trust.

Where money can be recovered in an ordinary action, the statute of limitations is a valid defence. Wood Limitations, section 59. In discussing this question the author referred to says: "In cases where the jurisdiction of equity is concurrent with courts of law, that is, when a right is sought to be enforced in equity for which the party has a remedy at law, it would operate as a virtual repeal of the statute, if parties by a change of forum could evade its effect." *Ibid.* It would certainly be a strange rule that would make the operation of the statute depend simply upon the character of the remedy adopted or the nature of the forum chosen, and the law is not subject to the reproach of sacrificing a substantial right to the mere form of the remedy selected by the complainant. *Smith v. Calloway*, 7 Blackf. 86, see p. 88.

It is well settled that an ordinary action may be maintained to recover taxes wrongfully and illegally assessed and collected. *City of Indianapolis v. McAvoy*, 86 Ind. 587.

It is, as we have said, only to pure or direct trusts that the equitable rule denying the validity of the defence of the statute of limitations applies. Angell thus states the law: "But in cases of resulting, implied, and constructive trusts, the rule is otherwise, it being well settled, as a rule of equity, that, where a claim is made after a great length of time against the holders of trusts of this description, the statute of limitations will apply, as likewise presumption from lapse of time." Angell Limitations, section 469. Our own court has repeatedly declared and enforced this principle.

In *Raymond v. Simonson*, 4 Blackf. 77, it was said: "The general rule, however, that the statute of limitations is a bar to suits in equity, as well as actions at law, has its limits. It is opposed by another general rule, that in cases of frauds and trusts, the statute of limitations does not run. The trusts

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coming within this rule are direct trusts; technical and continuing trusts, which are not cognizable at law, but which are mere creatures of a court of equity, and fall within the proper and exclusive jurisdiction of chancery. There are numerous eventual and possible trusts, that are raised by implication of law and otherwise, that fall within the control of the statute. Every deposit is a trust; every person who holds money to be paid to another, or to be applied to any particular and specific purpose, is a trustee, and may be sued either at law or in equity. Contracts of bailment are express and direct trusts, but these are all within the statute. The sound rule then is, that the trusts not reached or affected in equity by the statute of limitations, are technical and continuing trusts, of which courts of law have no cognizance." The same general principle is asserted in *Smith v. Calloway*, *supra*, and in *Musselman v. Kent*, 33 Ind. 452, it was said: "It is also claimed that in cases of trusts the statute does not run, but this is true only of trusts of a certain character. Those technical and continuing trusts of which courts of chancery alone had jurisdiction are of this character. *Smith v. Calloway*, 7 Blackf. 86. We do not think the trust which the law forces upon the party in such a case as this is exempt from the operation of the statute." There are many authorities supporting the rule of this court, among them *Wilmerding v. Russ*, 33 Conn. 67, *Kane v. Bloodgood*, 7 Johns. Ch. 90, *Robinson v. Hook*, 4 Mason, 139, *Tinnen v. Mebane*, 10 Texas, 246, *Wingate v. Wingate*, 11 Texas, 430, *Hovenden v. Lord Annesley*, 2 Sch. & Lef. 607, *Lockey v. Lockey*, Prec. Ch. 518.

These authorities, to which many more might be added, show that it has always been the rule that there are many kinds of trusts against which the statute of limitations will run, and they show, moreover, that it is not correct to affirm, as is sometimes done, that the statute never runs in the case of a trust. This statement is true of direct, technical trusts created by express law, or by deed or will, but it is not true

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of implied trusts, where there is concurrent equity and law jurisdiction.

The appellant's counsel contend that no cause of action accrued until a demand was made, and that the statute did not begin to run until that time. If we were to grant the assumption of counsel, it would avail them nothing, for the demand was not made until after the statute had run, and in such cases the demand is fruitless. Courts of equity will deny relief in cases of this character, since, to hold otherwise, would put it in the power of the party to destroy the beneficial effect of the statute. This question is so well argued in *High v. Board, etc.*, 92 Ind. 580, that it is unnecessary to again discuss it.

The assumption that a demand is essential to create a cause of action is not sustained by the authorities. *Peyser v. Mayor*, 70 N. Y. 497 (26 Am. R. 624); *Baker v. Kennedy*, 16 Central L. J. 293; *Kitchen v. Bedford*, 13 Wall. 416.

Judgment affirmed.

Filed Nov. 4, 1885.

No. 12,697.

THE STATE v. FISHER.

CRIMINAL LAW.—*Conviction of Simple Mayhem or Assault and Battery, Under Indictment for Malicious Mayhem.*—Under an indictment for malicious mayhem, the defendant may, if the evidence warrant it, be convicted of simple mayhem, or of an assault and battery. Sections 1834 and 1835, R. S. 1881.

From the White Circuit Court.

W. C. Smith, Prosecuting Attorney, *W. S. Hartman*, *A. W. Reynolds* and *E. B. Sellers*, for the State.

R. Gregory, for appellee.

ZOLLARS, J.—Section 1912, R. S. 1881, provides, that whoever purposely and maliciously, with intent to maim or

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The State v. Fisher.

disfigure, cuts, bites or slits the nose, etc., or puts out or destroys an eye of another person, etc., is guilty of malicious mayhem, and upon conviction thereof shall be imprisoned in the State prison not more than fourteen years, nor less than two years, and be fined not more than \$2,000.

The following section, 1913, provides, that whoever violently and unlawfully deprives another of the use of any bodily member, or unlawfully and wilfully disables the eye, etc., of another, is guilty of simple mayhem, and upon conviction thereof shall be fined not more than \$2,000, nor less than \$5, and shall be imprisoned in the county jail, not more than six months, nor less than twenty days. Appellee was indicted for malicious mayhem.

The indictment charges that he feloniously, purposely and maliciously destroyed the eye of another, with intent thereby, feloniously, purposely and maliciously to maim him.

The court refused instructions asked by the State, which were, in substance, that if the jury were not satisfied by the evidence beyond a reasonable doubt, that appellee was guilty of malicious mayhem, but were convinced by the evidence beyond a reasonable doubt, that he was guilty of simple mayhem, or of an assault and battery, they might acquit him of malicious mayhem, and convict him of simple mayhem or of assault and battery. The court gave the following: "Proof showing the defendant guilty of assault and battery only, or of mere simple mayhem, will not be sufficient to sustain this charge. The question here is, whether the defendant is guilty of the crime of the malicious mayhem with which he is charged." The State excepted to the refusal of its instructions, and to the giving of the court's charge. Appellee was acquitted. The State appeals.

The question presented by the record, and upon which the State asks the judgment of this court is: Can a person charged with malicious mayhem, if the evidence warrants it, be convicted of simple mayhem, or of an assault and battery? We think that question must be answered in the af-

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firmative. If a person purposely and maliciously put out or destroy the eye of another, with the intent to maim him, he is guilty of malicious mayhem. If he violently and unlawfully put out or destroy the eye of another, but without malice, he is guilty of simple mayhem, or, it may be, of an assault and battery only, according to the evidence. Malicious intent is the only thing that distinguishes malicious mayhem from simple mayhem. An assault and battery and simple mayhem are necessarily included in malicious mayhem, Add to an assault and battery mayhem and malicious intent, and we have the offence of malicious mayhem. Add to mayhem malicious intent, and we again have malicious mayhem. Malicious mayhem can not be proven without proving necessarily an assault and battery and mayhem.

The statute provides that upon an indictment for an offence consisting of different degrees, the jury may find the defendant not guilty of the degree charged, and guilty of any degree inferior thereto, or of an attempt to commit the offence. R. S. 1881, section 1834. And, further, that in all cases the defendant may be found guilty of any offence, the commission of which is necessarily included in that with which he is charged in the indictment. R. S. 1881, section 1835.

These rules have been often applied in this State. It has been held, that a person charged with rape may be acquitted of that charge, and convicted of an assault and battery, because the charge necessarily includes an assault and battery. See *Mills v. State*, 52 Ind. 187, and cases there cited. In that case it was said: "Where the accusation includes an offence of an inferior degree, the jury may discharge the defendant of the higher offence, and convict him of the less atrocious crime. This rule applies in all cases where the minor offence is necessarily an elemental part of the greater, and where proof of the greater necessarily establishes the minor." See, also, *Richie v. State*, 58 Ind. 355. And so, it has been held, that upon an indictment for murder in the first or second degree, the defendant may be convicted of voluntary or invol-

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untary manslaughter. See *Powers v. State*, 87 Ind. 144, and cases there cited. And so, too, it has been held that upon an indictment for an assault and battery with intent to commit murder, there may be a conviction of an assault and battery with intent to commit murder in the second degree, or voluntary manslaughter; or there may be a conviction for an assault and battery only. See *Gillespie v. State*, 9 Ind. 380; *State v. Throckmorton*, 53 Ind. 354; *Behymer v. State*, 95 Ind. 140; *Barnett v. State*, 100 Ind. 171.

These cases rest upon the familiar rule, that a defendant may be acquitted of the degree of crime charged, and be found guilty of a degree inferior thereto, and may be acquitted of the specific crime charged and found guilty of any offence, the commission of which is necessarily included in that charged. If any authority, beyond the statements of these rules, and the above authorities, were needed to sustain our conclusion in this case, it is found in the case of *Guest v. State*, 19 Ark. 405. That was a prosecution for malicious mayhem under a statute like ours. It was held that the defendant might be acquitted of the charge of malicious mayhem, and convicted of assault and battery.

The learned judge below erred in refusing the instruction asked and in giving the instruction complained of. The appeal is, therefore, sustained, at the cost of appellee.

Filed Nov. 20, 1885.

No. 12,179.

HANCOCK v. FLEMING ET AL.

VENDOR AND PURCHASER.—*Distinction Between Assuming and Taking Subject to Encumbrance.*—Where the purchaser of real estate assumes the payment of a mortgage thereon, he makes himself personally liable for the debt; but where he simply buys subject to the mortgage, he does not become so liable. In both cases, however, he takes the land charged with the debt.

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SAME.— *Sheriff's Deed.*— *Merger.*— *Subrogation.*— *Mortgage.*— *Foreclosure.*— *Equity.*— *Notice.*— Where one takes a deed to real estate subject to, but without agreeing to pay, a mortgage thereon, and without actual notice of any other encumbrance, he can not defeat the mortgage lien by obtaining a sheriff's deed under a sale on a prior judgment, as the title thus taken merges in that previously held, although equity will keep such judgment alive for his protection, and a foreclosure must be had subject to it.

From the Grant Circuit Court.

G. W. Harvey, H. D. Thompson and T. B. Orr, for appellant.

MITCHELL, C. J.—This suit was brought to foreclose a mortgage executed by Fleming and wife to Hancock.

All the questions presented for decision arise, as well upon the special findings of the court, as upon the pleadings. We will therefore consider only the special finding of facts, and determine the correctness of the conclusions of law stated thereon.

The facts found are briefly, that Jane Fleming, being the owner of a tract of land in Grant county, and having executed the mortgage in suit, joined in a warranty deed with her husband, on July 16th, 1877, by which they conveyed the land to Kelsey & Wood. The deed, otherwise in statutory form, had in it a recital that the conveyance was subject to plaintiff's mortgage, specifying its amount at \$225. There was no assumption of payment by the purchasers. At the time the conveyance was made, Fleming and wife represented that the encumbrance recited was the only one existing against the land, and the grantees had no actual notice of any other. Prior to the date of plaintiff's mortgage the land was owned by Smith, who while such owner suffered a judgment to be taken against him for \$341.03, in favor of Forkner, Scott & Elmer. This was a lien prior to the plaintiff's mortgage. After the deed to Kelsey & Wood, the land was sold at sheriff's sale to satisfy an execution issued on the judgment above mentioned. Kelsey & Wood, for the

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purpose of protecting their title, purchased the land at the execution sale, and at the end of one year, no redemption having been made, Kelsey received a sheriff's deed. Wood disclaimed any interest in the land.

The conclusions of law stated by the court were, in substance, that as there was no agreement by Kelsey & Wood to pay the plaintiff's debt, and the mortgage securing it being subsequent to the Forkner, Scott & Elmer judgment, the title which Kelsey acquired under the sheriff's deed was paramount to the plaintiff's mortgage, and that the plaintiff was, therefore, not entitled to foreclose it against Kelsey, whose title it was found ought to be quieted. Whether the conclusions thus stated can be sustained depends upon the force attributable to the recital in the deed to Kelsey & Wood, and the relation into which they and the land purchased by them were brought to the plaintiff's mortgage.

It is argued that Kelsey & Wood became the principal debtors, and personally bound for the plaintiff's debt. This view of the case is not maintained. They were not personally liable. "The difference between the purchasers assuming the payment of the mortgage, and simply buying subject to the mortgage, is simply that in the one case he makes himself personally liable for the payment of the debt, and in the other case he does not assume such liability. In both cases he takes the land charged with the payment of the debt, and is not allowed to set up any defence to its validity." Jones Mort., section 736; *Atherton v. Toney*, 43 Ind. 211; Pomeroy Eq. Jur., section 1205. The land, nevertheless, remained the primary fund as between the purchaser and the mortgagee, out of which payment of the debt must be made.

The grantees having presumably retained the amount recited out of the purchase-price, they were estopped from disputing the validity of the mortgage, or that the amount of the debt was not the sum recited. Moreover, they could do nothing thereafter which would render the mortgage ineffectual as a valid lien upon the land as respects the right in

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which they held it. That they might have purchased a title paramount, without such title enuring to the benefit of the plaintiff's mortgage, may be conceded. Jones Mort., section 739; *Knox v. Easton*, 38 Ala. 345.

But the title which Kelsey acquired through the medium of the sheriff's sale was not a title paramount in such sense. It was derived through the same source as that already acquired through the Flemings. The rule is almost universal, that where two titles come together in the same person, from the same source, without any intervening estate, the one last acquired will merge in the first. That acquired last will only be kept on foot to subserve some equitable purpose. Against the recital in the deed of Kelsey & Wood, equity will not prevent the merger of the title last acquired, and thus defeat the stipulation in their deed.

Upon this subject we said, in *Birke v. Abbott*, *ante*, p. 1: "Ordinarily, any person may acquire title to land through the medium of a sheriff's sale, but there may be cases in which the purchaser, from his relation to the land sold, or to the judgment upon which the sale is made, is precluded from acquiring title under such judgment or sale."

The recital in the deed to Kelsey & Wood put them in such relation to the land and the mortgage that they can not thus defeat the mortgage lien.

The purchase by Kelsey & Wood under the execution sale, while it was not effectual to invest them with title paramount, nevertheless worked an equitable assignment of the Forkner, Scott & Elmer judgment.

As they were under no personal covenant to pay either the judgment or the plaintiff's mortgage, equity will keep the judgment alive for their protection.

The distinction between this case and *Birke v. Abbott*, *supra*, is, that in the case cited the purchaser expressly assumed the payment of the prior encumbrances by a stipulation in his deed. It was held that having purchased the land at sheriff's sale, made to satisfy the encumbrances assumed, he would

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be treated as having paid them off. Having thus done nothing more than he had contracted to do, equity would not prevent the title thus acquired from merging, nor subrogate him to the lien which was discharged by payment.

In the case under consideration there was no agreement to pay. While equity will not, as against the stipulation in the deed to Kelsey & Wood, prevent the title from merging, it will, in the absence of an express assumption, preserve the lien of the judgment which they were compelled to pay, for their protection.

A standard author says: "When an owner of the premises who is not personally and primarily liable to pay the debt secured, pays off a mortgage or other charge upon it, he may keep the lien alive as a security for himself against other encumbrances or titles, and thus prevent a merger." Pomeroy Eq. Jur., section 798. *Elston v. Castor*, 101 Ind. 426.

Payment of the prior encumbrance having been made necessary to protect the prior title, the doctrine of subrogation applies.

In a case like this the principles which ruled *Peet v. Beers*, 4 Ind. 46, and *Ayers v. Adams*, 82 Ind. 109, are applicable. See, also, *Spray v. Rodman*, 43 Ind. 225; *Sidener v. Pavey*, 77 Ind. 241.

This conclusion requires Kelsey & Wood to give effect to the recital in their deed. It results in the violation of no agreement on their part, and does not put the appellant in any worse situation than he was in before.

There should have been a decree of foreclosure in favor of the appellant and for the amount of his debt, subject to the lien of the judgment.

As the special finding of facts is not sufficiently full to enable us to determine the amount of the several liens so as to order the proper judgment, the judgment rendered is reversed, with costs, and a new trial ordered.

Filed Nov. 19, 1885.

 Thomas *et al.* v. Simmons.

No. 10,517.

THOMAS ET AL. v. SIMMONS.

MORTGAGE.—*Merger.—Assignment of Decree.—Execution Over for Balance After Sale.*—Where a junior mortgagee, after obtaining a decree of foreclosure and a personal judgment with right to execution over for any balance after sale, receives a sheriff's deed as assignee of the certificate of sale under a senior mortgage, and then conveys the land by warranty deed to a third person, his decree, in the absence of any intervening equities, merges in the title so derived; and, there having been no sale thereunder, and hence no ascertained balance, execution could not, under section 634 of the code of 1852, be had against other property of the mortgagor, either in favor of himself or one who took it by assignment after the merger became complete.

INJUNCTION.—*Will Lie to Prevent Cloud Being Cast Upon Title.*—The owner of real estate may, by injunction, prevent a cloud being cast upon his title.

APPEAL.—*Costs.*—One who resists the granting of a new trial, and takes a final decree upon a defective finding of facts and erroneous conclusions of law, will, on appeal by the other party, be taxed with the costs of the same, although on such appeal he is adjudged to be entitled to a greater relief than that granted below.

SUPREME COURT.—*Reversal Upon Cross Errors.*—A judgment will not be reversed upon cross errors where the appellee insists upon an affirmance.

From the Hancock Circuit Court.

J. A. New, J. W. Jones and J. H. Mellett, for appellants.

W. R. Hough and L. H. Reynolds, for appellee.

NIBLACK, J.—Complaint, in seven paragraphs, by Noah D. Simmons against Lucian B. Thomas, Israel P. Poulson and William H. Thompson, sheriff of Hancock county, for an injunction. Demurrers were sustained to the first, third, fourth and seventh, and overruled as to the second, fifth and sixth paragraphs.

The second paragraph charged that one Marion Forgey was, on the 9th day of November, 1876, the owner of several tracts of land in Hancock county, containing in the aggregate one hundred and sixty-nine acres; that on that day he, with his wife, Mary F. Forgey, executed a mortgage upon those tracts of land to the administrator of the estate of Wil-

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liam S. Wood, deceased, to secure the payment of two promissory notes given by him, the said Marion, the first for the sum of \$2,885.03, payable three hundred and sixty-five days after date, and the second for a like sum, payable eighteen months after date; that said administrator thereupon assigned and transferred the first of these notes to one William R. Hough, and the second note to the defendant Poulson; that when the first note became due Hough brought suit in the Hancock Circuit Court to foreclose the mortgage given to secure it, making Forgey and wife and Poulson defendants, and obtained judgment for \$2,920.10, and a decree foreclosing the mortgage and ordering a sale of the mortgaged lands; that Hough thereafter, that is to say, on the 18th day of February, 1878, became the purchaser of all such lands at sheriff's sale under his decree, and received the sheriff's certificate of his purchase; that on the 6th day of June, 1878, Poulson, by proper proceedings against Forgey and wife and others in the Hancock Circuit Court, recovered a personal judgment, against Forgey upon the second note for \$3,150.13, and took a junior decree of foreclosure of the mortgage, executed as herein above stated, with an order for execution against the other property of Forgey for any balance which might remain unpaid after the mortgaged lands should be exhausted; that, on the 5th day of August, 1878, Poulson paid to Hough the amount of money necessary to redeem the mortgaged lands from the sheriff's sale under the latter's decree, and received from Hough an assignment of the sheriff's certificate of purchase issued to him as above averred; that, on the 22d day of February, 1879, Poulson received a deed of conveyance for the mortgaged lands from the sheriff of Hancock county upon the certificate of purchase as the assignee of Hough; that on the 16th day of December, 1879, Poulson sold, conveyed and warranted a part of the lands thus conveyed to him by the sheriff to the above named Mary F. Forgey, and on the 3d day of January, 1880, in like manner, sold, conveyed and warranted the rest or remainder of

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such lands to one Calpurna Moore ; that without ever having taken out execution upon his decree of foreclosure against Forgey and wife and others, rendered as above, Poulson, on the 21st day of March, 1881, assigned said decree to the defendant Thomas.

The second paragraph of the complaint further charged that, on the 10th day of May, 1877, Marion Forgey was the owner of several small tracts of land other than those mortgaged as above to the administrator of Woods' estate, and that, on that day, he, without the concurrence of his wife, mortgaged such other lands to Simmons, the plaintiff, to secure the payment of a promissory note for the sum of \$3,-414.71; that at the time of making this mortgage the real estate covered by it was unencumbered except by a judgment in favor of the First National Bank of Cambridge City for \$2,235.94; that, on the 16th day of November, 1878, Forgey, the mortgagor, was, upon his own petition, adjudged a bankrupt, and at a sale of his real estate by his assignee, his wife, Mary F. Forgey, became the purchaser of his interest in the lands mortgaged to Simmons subject to the lien of the bank judgment and to the Simmons mortgage; that afterwards, on the 23d day of January, 1880, the said Mary F. Forgey, in consideration of a promissory note for \$1,353.33, payable two years from date, and the further sum of \$1,803.15, paid by him on the bank judgment, conveyed to Simmons her entire estate in the lands embraced in his mortgage, she, at the same time, paying the balance which remained due on such judgment; that the plaintiff, desiring to sell the real estate thus conveyed to him, and believing that all liens upon it except his own had been discharged, entered satisfaction of his mortgage upon the margin of the record upon which it was recorded; that, on the 24th day of March, 1881, the defendant Thomas caused a certified copy of the decree of foreclosure, assigned to him by Poulson, to be made out, as well as an ordinary execution to be issued upon the same, and directed to the defendant Thompson as

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sheriff of Hancock county, who, by virtue of such certified copy of the decree as well as said execution, levied upon the lands first mortgaged to the plaintiff and afterwards purchased by him of Mary F. Forgey, and advertised the same for sale to satisfy said decree of foreclosure. Wherefore the plaintiff charged that said decree of foreclosure had been merged in the higher title derived by Poulson through the sheriff's deed under the decree in favor of Hough, and demanded that the defendants be enjoined and inhibited from selling the lands so levied upon to satisfy said decree; that in the event the defendants might not be so enjoined and inhibited, then that the plaintiff be subrogated to the rights of the bank in the bank judgment to the amount paid by him on such judgment, and that his mortgage on the lands in controversy be decreed to be a subsisting and unsatisfied lien upon said lands, and that he might have all other proper relief.

This paragraph contained other averments and other specific demands for relief, but the view we have taken of this case renders it unnecessary that we shall particularly refer to such other averments and other demands for relief.

The fifth and sixth paragraphs of the complaint were not so elaborate as the second, but they in effect severally charged that the plaintiff was the owner of the real estate levied upon by the sheriff and prayed that the defendants might be enjoined and inhibited from selling such real estate upon any process issued upon the Poulson decree.

Questions were reserved upon some of the subsequent pleadings, but not regarding any of the questions thus reserved as of any practical importance at the present hearing, we do not further refer to them.

As regards the subsequent pleadings, which included answers and replies, it is sufficient to say that issue was joined upon the second, fifth and sixth paragraphs of the complaint. The court, after hearing the evidence, made a special finding of facts from which certain conclusions of law were drawn.

Over exceptions to the conclusions of law, and over a mo-

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tion for a new trial, it was, amongst other things, adjudged and decreed that the defendants be enjoined and inhibited from selling one undivided third part of the lands levied upon under the Poulson decree, and that, as against the remaining two-thirds of said lands, the plaintiff be subrogated to all the rights of the First National Bank of Cambridge City, to the extent paid by him, in its judgment against Marion Forgey and others, mentioned in the complaint, and that his mortgage upon said lands be declared and held to be a subsisting and undischarged lien upon the same.

The first question argued, which we deem it necessary to notice, involves the sufficiency of the second paragraph of the complaint, and the question of its sufficiency depends upon the construction which ought to be given to the Poulson decree of foreclosure and to the conduct of Poulson in purchasing Hough's superior interest in, and inchoate title to, the mortgaged lands, and in selling and conveying those lands to other persons.

The Poulson decree was rendered under the authority of section 634 of the code of 1852, which was in force at the time, and which was as follows: "When there is an express written agreement for the payment of the sum of money secured, contained in the mortgage, or any separate instrument, the court shall direct in the order of sale that the balance due on the mortgage and costs which may remain unsatisfied after the sale of the mortgaged premises, shall be levied of any property of the mortgage debtor." 2 R. S. 1876, p. 262; R. S. 1881, section 1097.

Freeman on Execution, at section 10, referring to similar decrees, says: "In some instances, decrees direct the sale of certain property, and make the defendant responsible for the deficiency remaining after the proceeds of the sale have been applied to the payment of the plaintiff's demand. In such cases, the amount to be paid by defendant is uncertain and contingent; and, therefore, no execution can issue against him until the sale has been completed and the deficiency ascer-

tained." *Bank of Rochester v. Emerson*, 10 Paige, 115; *Cobb v. Thornton*, 8 Howard Pr. 66.

This statement of the law by Freeman affords a fair and natural construction of all that class of decrees specially authorized by the section of the code of 1852, above set out, and hence has a practical application to the decree rendered in favor of Poulson. Neither Poulson nor Thomas was, consequently, entitled to levy upon, or have execution against, other property of Marion Forgey until the mortgaged lands were exhausted by a judicial sale, and a deficiency was in that way ascertained..

On the subject of merger, Boone on Mortgages aptly states the doctrine to be that, "At law, whenever a greater estate and a less estate meet and coincide in one and the same person, in one and the same right, without any intermediate estate, the less estate is immediately annihilated, or is said to be merged. As applied to mortgages, the general rule is, that a merger takes place only when the whole title, equitable as well as legal, unites in the same person. The reason of the rule is, that when the entire equitable and legal estates are united in the same person, there can be no occasion to keep them distinct, for ordinarily it could be of no use to the owner to keep up a charge upon an estate of which he was seized in fee simple; but if there is an outstanding, intervening title, the foundation for the merger does not exist, and the merger does not take place."

The same author further states the true test of merger to be the intent of the parties, either as expressed by some specific agreement or as implied from all the circumstances attending the transaction, and adds that, "As a general rule, a mortgage which has been substantially satisfied by payment is extinguished. And although equity will sometimes keep alive a mortgage which has been substantially satisfied, yet, whenever this is done, it is for the advancement of justice, and never to aid in the perpetration of a fraud through the forms of law. A sum of money received by the creditor upon

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the land and mortgage, if intended and declared to apply on the instrument, at the time, in total or partial satisfaction thereof, will have that effect; and no subsequent change of intent by the debtor can retroact, or renew the security, without the consent of the parties interested, and without prejudice to third persons. * * * When the equity of redemption is purchased by the mortgagee, the general rule is, that the mortgage will be regarded as extinguished, whenever it would be inequitable, or contrary to the clear intention of the parties, or conducive to fraud, to consider it as still subsisting. Conveyance by a mortgagee in possession, after default, merges the mortgage." See sections 141, 142, 143. See, also, Jones Mort., section 870; *Elston v. Castor*, 101 Ind. 426.

This doctrine of merger, as applied to a mortgage, is based upon the theory that when the mortgagee has acquired title in fee simple, he has appropriated to his exclusive use the fund or property accepted by him, or those under whom he claims, as security for the payment of the mortgage debt, and that the debt has thereby become presumptively satisfied. This presumptive satisfaction may, as above intimated, be overcome by proof of an express agreement to the contrary, or of facts and circumstances inconsistent with it.

When Poulson obtained an assignment of the sheriff's certificate from Hough one of two ways was open to him. One was to treat his seeming purchase of the certificate as a practical redemption of the mortgaged lands from the sale to Hough and proceed to sell those lands under his own decree with a view to testing their sufficiency to pay the personal judgment against Marion Forgey contained in the decree, and the other was to wait until the time for redemption from the sale under Hough's decree expired, and then receive and rely upon a sheriff's deed as a complete title in fee simple without reference to any claim under his own decree. He seems to have adopted the latter course, and that afforded *prima facie* evidence, at least, of a merger of his decree in

the greater estate acquired through Hough. But he went further and consummated an absolute and unquestionable merger of his decree by conveying away the lands with covenants of warranty to other persons. These conveyances precluded him, if he was not already so precluded, from asserting any anterior lien against the land. Being so precluded, his assignment of his decree to Thomas, made afterwards, carried with it nothing of value to the latter. It was then too late to have the mortgaged lands again sold on the the Poulson decree, and hence the right to have execution against other property of Marion Forgey could never accrue. The circuit court did not, therefore, err in overruling the demurrer to the second paragraph of the complaint.

There is a conflict in the authorities as to the right of the owner of real estate to have an injunction to prevent a cloud being cast upon his title, but in this State the right to have an injunction for such a purpose is fully recognized. *Bishop v. Moorman*, 98 Ind. 1 (49 Am. R. 731); *Petry v. Ambroscher*, 100 Ind. 510.

Upon the authority of our cases sustaining that right, we regard the fifth and sixth paragraphs of the complaint as having also been sufficient upon demurrer.

The facts, as specially found by the circuit court, were, in their main features, in general accordance with those averred in the second paragraph of the complaint, but in one essential respect the facts were not as fully found as they were averred in the paragraph of the complaint in question, and as they were apparently established by the evidence, and that was in not finding that Poulson conveyed away the lands embraced in his decree of foreclosure to other persons before assigning the decree to Thomas.

Some of the conclusions of law were favorable to the plaintiff and others were adverse to his claim to full relief. Taking all of them together, they placed the case before the circuit court in a very imperfect and unsatisfactory condition

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as the basis of a full, final and proper decree on the merits of the cause. One of the conclusions, drawn by the court, was to the effect that the plaintiff was entitled to be subrogated to certain rights, as herein above at length stated, in the judgment held by the First National Bank of Cambridge City against Marion Forgey and others, and that the mortgage executed by the said Forgey to the plaintiff ought to be reinstated and declared to be in force as a continuing lien.

Such subrogations and reinstatements of liens are only decreed when necessary to promote the ends of justice, and the evidence having, as we believe, shown the plaintiff to be entitled to higher relief, and relief of a different character, the conclusion of law in question was erroneous. The error, too, was one of which the defendants had the technical right, at least, to complain, as it led to an erroneous decree in some respects against them.

We would remand the cause, with instructions to state new conclusions of law upon the special finding of facts, if we felt assured that the facts had been fully found by the circuit court, but, not feeling so assured, we think the case can more surely be placed upon a proper footing by a reversal of the judgment and by being remanded for a new trial. As the plaintiff resisted the granting of a new trial below and took the final decree appealed from upon a defective finding of facts, as well as upon erroneous conclusions of law, our inference is that he ought to be taxed with the costs of this appeal.

The judgment is reversed, at the costs of the appellee, and the cause remanded for a new trial.

Filed Sept. 15, 1885.

ON PETITION FOR A REHEARING.

NIBLACK, J.—One of the grounds of complaint preferred by a petition for a rehearing is, that we did not make specific rulings upon certain cross errors assigned by the appellee, and another is, that if the judgment ought to have been re-

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versed, it should have been so ordered upon the cross errors assigned as above stated.

Cross error is assigned primarily to prevent a reversal of the judgment by showing that whatever error, abstractly considered, may have been committed against the appellant during the progress of the cause, he has still no reason to complain of the ultimate decision against him from which he appeals, and secondarily, in the event that the judgment shall be reversed, that the appellee may obtain a ruling of this court upon the question or questions intermediately decided against him, for the guidance of the court below after the cause shall be remanded. Buskirk Pr. 119.

When such error has intervened as induces the appellee to believe either that the judgment ought to be, or will be, reversed, it is competent for him to confess error, and thus to cause, without delay, a reversal of the judgment, but no case has been cited, and we know of none, in which a judgment has been reversed upon cross error, where, as in this case, the appellee insisted upon an affirmance of the judgment.

In this case all the material questions presented by the assignment of cross errors were in legal effect passed upon either directly or inferentially by the arguments and illustrations used in, or the conclusions reached by, the original opinion. Hence no injustice was done to the appellee by not specifically noticing his assignment of cross errors.

Other grounds of complaint are urged against the original opinion, but they present nothing that was not substantially considered at the former hearing.

The petition for a rehearing is overruled.

Filed Nov. 21, 1885.

Carr v. The State, for Use of Cottingham, Drainage Commissioner.

No. 12,289.

CARR v. THE STATE, FOR USE OF COTTINGHAM, DRAINAGE
COMMISSIONER.

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| 190 | 562 |
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| 181 | 220 |
| 132 | 499 |
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| 135 | 12 |
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| 137 | 224 |
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| 145 | 144 |
| 147 | 154 |
| 103 | 548 |
| 158 | 163 |

DRAINAGE.—Notice.—Where notice of an intention to file a petition for drainage is of the character prescribed by the statute, it is sufficient.

SAME.—Need not be Formally Approved by Court.—Where the court acts upon the notice, no formal order approving it is necessary.

SAME.—Sufficiency of.—Ordinarily it is sufficient to serve notice on the person who is described in the petition and is named on the tax duplicate as the owner.

SAME.—Docketing.—Waiver.—Practice.—A failure to note on the petition the day for docketing the same is a mere irregularity, and if not objected to within three days after it is docketed the objection is waived.

From the Hamilton Circuit Court.

W. Booth and D. Moss, for appellant.

G. Shirts and W. R. Fertig, for appellee.

ELLIOTT, J.—This action was brought by the appellee to enforce an assessment for the construction of a ditch, levied under the act of April 8th, 1881.

The first objection to the validity of the assessment is that the notice of the filing of the petition was not sufficient.

The special finding states that proof of notice was made by affidavit showing that notices were posted. It was sufficient to give notice by posting as the statute provides. *Meranda v. Spurlin*, 100 Ind. 380. It is competent for the Legislature to provide what kind of notice shall be given, and where the notice is of the character prescribed by statute, it is sufficient. *Hobbs v. Board, etc., post*, p. 575, and authorities cited.

Where the court acts upon a notice, it is not necessary to make a formal entry declaring it to be such as the law requires. The action of the court is sufficient without any formal order approving the notice. *Platter v. Board, etc., ante*, p. 360, and authorities cited; *Cauldwell v. Curry*, 93 Ind. 363; *Board, etc., v. Hall*, 70 Ind. 469.

A failure to note on the petition the day for docketing the

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same is a mere irregularity, and if not objected to within three days after the petition is docketed, the objection is deemed waived. *Smith v. Smith*, 97 Ind. 273.

The land was described in the petition, and the name of the owner was thus given: "The estate of Thomas Carr and Clarka Carr, of which Joseph Booth is executor."

It has often been held by this court, and by other courts, that such a naming of the owner is sufficient in cases of assessment for taxes, and we see no reason why the same rule should not apply here. *Noble v. City of Indianapolis*, 16 Ind. 506; *Sloan v. Sewell*, 81 Ind. 180; *Jenkins v. Rice*, 84 Ind. 342; *Wheeler v. Anthony*, 10 Wend. 346; *State v. Collector, etc.*, 4 Zabriskie, N. J. 108. We affirm this because the amendatory act of 1883 provides that "Such petition shall be sufficient to give the courts jurisdiction over the lands described therein, and power to fix a lien thereon if they are described as belonging to the person who appears to be the owner according to the last tax duplicate or record of transfer." Acts 1883, p. 174. There is a difference between the name of the owner of the land as given on the tax duplicate and as given in the petition, but it is not of such a material character as to avoid the proceedings. We think it sufficient to serve the notice of the assessment on the person who is described in the petition and is named on the tax duplicate as the owner. This is the principle declared in *Jenkins v. Rice, supra*, and it is a sound one. If it appeared that the appellant had been misled or injured by the failure to serve notice on her, or if it appeared that she was known to be the owner, it may be that the courts would grant her relief, but where no such facts appear, the service of the notice on the persons named in the petition is sufficient. Here it appears that the appellant had an opportunity to defend. Naming her in the petition would have secured her no greater rights, and therefore no injury was done her.

Judgment affirmed.

Filed Nov. 20, 1885.

 Padgett v. The State.

No. 12,667.

PADGETT v. THE STATE.

CRIMINAL LAW.—Felonious Intent.—Evidence.—The State is not required to sustain a charge of felonious intent by direct evidence. It is sufficient if the evidence is such as will satisfy the triers, beyond a reasonable doubt, of such intent.

SAME.—Supreme Court.—Weight of Evidence.—The Supreme Court will not disturb a finding on the weight of the evidence.

SAME.—Arrest of Judgment.—The second statutory cause for arrest of judgment (section 1843, R. S. 1881) presents no question as to the failure of the grand jury to return the indictment into open court.

SAME.—Return of Indictment into Open Court.—The record shows that the grand jury returned into open court seven indictments, each signed by the prosecuting attorney and properly endorsed by the foreman, and numbered 1740, 1743, etc., and that they were duly examined and filed. Indictment No. 1743 is set out, with all its endorsements, as the indictment against appellant.

Held, that a return is sufficiently shown.

From the Daviess Circuit Court.

C. K. Tharp, for appellant.

F. T. Hord, Attorney General, *W. B. Hord* and *J. H. Spencer*, for the State.

Howk, J.—The indictment in this case charged that the appellant, "Marshall Padgett, on the 25th day of July, 1885, at the county of Daviess, and State of Indiana, did then and there, in a rude, insolent and angry manner, unlawfully touch, strike and beat one William James, with intent then and there, and thereby, feloniously to steal, take and carry away the money of the said William James, of the value of three dollars, in the lawful currency of the United States."

Upon the appellant's arraignment and plea of not guilty, the issues joined were by agreement of the parties submitted to the court for trial, without the intervention of a jury. After hearing the evidence, the court found appellant guilty as charged in the indictment, and assessed his punishment at two years in the State's prison and a fine of ten dollars, and, over

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his motions for a new trial and in arrest, judgment was rendered accordingly.

In this court appellant has assigned as errors the overruling (1) of his motion for a new trial, and (2) of his motion in arrest of judgment.

The first question discussed by appellant's counsel, under the alleged error of the court in overruling the motion for a new trial, is the sufficiency, or rather, as counsel claims, the insufficiency, of the evidence to sustain appellant's conviction. It is true, as counsel contends, that in such a prosecution as this "the intent was the gist of the felony charged, and it devolved upon the State to make it out." *Greer v. State*, 53 Ind. 420; *White v. State*, 53 Ind. 595. But it is equally true that the State is not expected and can not be required to make proof of felonious intent, as a fact, by direct and positive evidence; for, as a general rule, men who do or commit acts, which the law denounces as public offences, do not proclaim in public places the intent with which such acts are done. If the State were required to make direct and positive proof of the felonious intent which characterizes the act done as a public offence, the result would be that many persons, charged and guilty of public crimes, would go acquit "unwhipt of justice." Therefore all that the State is required to do in such cases is to introduce such evidence on the trial of the cause as will satisfy the triers of the facts, whether court or jury, beyond a reasonable doubt, not only that the act was done by the defendant, but that it was done with the felonious intent charged in the indictment.

The case at bar is not a satisfactory one upon the evidence appearing in the record; and yet it is not a case where we are authorized to interfere with the finding and judgment of the trial court. The learned judge who tried the cause had opportunities and facilities which we can not have for determining the credibility of witnesses and the proper weight to be given to their evidence. Upon the question of the felonious intent, the evidence seems to us, from our reading of it, to be

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weak and unsatisfactory, but we can not say that there is a failure of evidence on that or any other material point in the case. In accordance with repeated decisions of this court in similar cases, we must decline, therefore, to disturb the finding of the trial court on the evidence. *Cox v. State*, 49 Ind. 568; *Long v. State*, 95 Ind. 481; *Murphy v. State*, 97 Ind. 579; *Dolke v. State*, 99 Ind. 229; *Clayton v. State*, 100 Ind. 201.

Under the alleged error of the court in overruling the motion in arrest of judgment, appellant's counsel contends that the judgment ought to have been arrested, because the record fails to show that the indictment in this case was returned by the grand jury into open court. This is not the cause assigned by appellant in his written motion in arrest, nor is it one of the statutory causes for which judgment may be arrested in a criminal cause. Section 1843, R. S. 1881, provides that a motion in arrest may be granted by the court for either of the following causes:

"*First.* That the grand jury which found the indictment had no legal authority to inquire into the offence charged, by reason of its not being within the jurisdiction of the court.

"*Second.* That the facts stated in the indictment or information do not constitute a public offence."

The second of these statutory causes is the only one assigned by appellant in his written motion for the arrest of judgment in this case. It needs no argument, we think, for the purpose of showing that this cause for the arrest of judgment did not present to the trial court, nor does it present here, the question discussed by counsel, as to whether or not the record fails to show that the indictment against appellant was returned by the grand jury into open court. But, if the question were properly presented here, we would hold that the record of this cause does affirmatively show with sufficient certainty that the indictment against the appellant was duly returned by the grand jury into open court. The record shows that on the 25th day of September, 1885, the following entry

The Pennsylvania Company v. Poor.

was made in the order-book of the court below, to wit: "Come now the grand jury and return in open court seven indictments, which are each signed Hiram McCormick, prosecuting attorney, and endorsed, A true bill, Stephen T. Gough, foreman, and numbered respectively on the backs thereof, 1740, 1743," etc. "And said indictments are examined by the court and filed by the clerk." Then indictment No. 1743 is set out, with all its endorsements, in the record before us, as the indictment against the appellant, Marshall Padgett, in this case.

In *Beard v. State*, 57 Ind. 8, it was held by this court, and correctly so we think, that the original indictment and all its endorsements constitute a necessary part of the record in a criminal cause, and that whatever may be shown, which is required to be shown, by these endorsements, must be considered by this court as shown by the record. See, also, *Clare v. State*, 68 Ind. 17, and *Greene v. State*, 79 Ind. 537.

We have found no error in the record of this cause which will authorize the reversal of the judgment.

The judgment is affirmed, with costs.

Filed Nov. 20, 1885.

No. 12,144.

THE PENNSYLVANIA COMPANY v. POOR.

COMMON CARRIER.—Ownership of Goods Consigned.—Pleading.—A complaint against a common carrier, alleging that it negligently failed to deliver certain goods consigned by the plaintiff, to his damage, is bad on demurrer, in the absence of an averment that the plaintiff owned the goods.

SAME.—Presumption.—The right of action against a common carrier, for the loss or damage of goods consigned, will be presumed to be in the consignee, in the absence of allegations showing the contrary.

PLEADING.—Evidence.—The sufficiency of a complaint must be determined by the facts pleaded, and the court can not look to the evidence to ascertain whether any injury resulted from the ruling on demurrer.

From the Morgan Circuit Court.

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| 103 | 553 |
| 167 | 260 |

The Pennsylvania Company v. Poor.

S. O. Pickens, for appellant.

W. R. Harrison, W. E. McCord, G. W. Grubbs and M. H. Parks, for appellee.

ELLIOTT, J.—The complaint of the appellee alleges that the appellant was, on the 4th day of September, 1882, a common carrier; that on that day he delivered to its agent at Martinsville twenty-four thousand pounds of green corn to be transported to Indianapolis; that the appellant undertook to deliver the corn to one Perry as the consignee, at Indianapolis, on that day, and that Perry was the consignee. Negligence in failing to deliver the corn is alleged, and damages are shown. To this complaint the appellant unsuccessfully demurred.

It is affirmed by the appellant's counsel, that the complaint is bad, for the reason that it affirmatively shows that the cause of action is in Perry, the consignee, and not in Poor, the consignor. This position is well assumed. The general rule unquestionably is that the right of action is in the consignee. It is so laid down in the text-books, and it has been so declared by this court. *Browne Carriers*, section 596; *Hutchinson Carriers*, section 727; *Madison, etc., R. R. Co. v. Whitesel*, 11 Ind. 55; *Pennsylvania Co. v. Holderman*, 69 Ind. 18.

There are exceptions to this general rule, but facts showing that the case forms an exception must be pleaded. The law presumes that the consignee is the real party in interest, and unless there are facts pleaded showing the contrary, this general presumption will prevail. We can find nothing in the complaint before us which takes the case out of the general rule. If the property was owned by the appellant, that fact should have been averred. In the absence of this averment, the presumption of which we have spoken rules the case.

Where a complaint is challenged by demurrer, and an exception is reserved, we can not look into the evidence to ascertain whether injury did or did not result. The sufficiency

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of the complaint is to be determined from the facts stated in it, and not from what may, or may not, appear in the evidence. The court can not examine evidence to determine a question presented by demurrer; for the demurrer presents the question fully, and the question presented must be decided according to the record. *Friddle v. Crane*, 68 Ind. 583; *Johnson v. Breedlove*, 72 Ind. 368; *Abell v. Riddle*, 75 Ind. 345; *Over v. Shannon*, 75 Ind. 352; *Conyers v. Mericles*, 75 Ind. 443; *Sims v. City of Frankfort*, 79 Ind. 446; *Wilson v. Town of Monticello*, 85 Ind. 10, see pp. 20, 21; *Weir v. State, ex rel.*, 96 Ind. 311, see p. 315.

Judgment reversed.

Filed Nov. 19, 1885.

No. 11,794.

ROUT v. KING ET AL.

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PARTITION.—*Sale by Commissioner.*—*Rights of Surety.*—*Parties.*—*Re-Sale.*—

One who is surety for the payment of purchase-money, upon a sale of real estate by a commissioner in partition, becomes a party to the proceeding, as also does the purchaser, and, upon the failure of the latter to pay, the surety may petition for, and the court in the exercise of its chancery powers may grant, a re-sale of the property,

From the Adams Circuit Court.

J. S. Dailey, L. Mock, J. W. Headington, J. J. M. LaFollette and E. G. Coverdale, for appellant.

R. S. Peterson, E. A. Huffman, J. T. France, W. J. Vesey and J. T. Merryman, for appellees.

MITCHELL, C. J.—It appears from the record in this case that certain real estate in Adams county had been sold by a commissioner appointed by the court for that purpose, in a partition proceeding.

John W. Rout, the appellant, bid the land off at forty-five hundred dollars. Three thousand dollars of the purchase-price was paid in cash, and for the residue the purchaser gave

Rout v. King et al.

his note, payable to the commissioner, with one King as surety. A certificate of purchase was thereupon issued to Rout, reciting that upon confirmation of the sale, and full payment of the purchase-price, he would be entitled to a deed. The sale was reported to and confirmed by the court, and the money paid was distributed to the persons entitled to receive it.

When the note for the deferred payment matured, the purchaser neglected to make payment, and the commissioner, without the order of the court, sued the makers of the note, and recovered judgment against the one as principal and the other as surety.

The purchaser, who it is alleged was insolvent, assigned the certificate of purchase to his wife. This, it was charged, was done for the purpose of defrauding the surety. The judgment remaining unpaid; King and the commissioner, each by separate petitions, in which the facts were stated at length, applied to the court for an order that the commissioner should re-sell the land. The purchaser, having been duly notified, appeared and resisted the applications thus made. After overruling separate demurrers to the several petitions, upon an issue made, the court ordered that in default of payment of the unpaid purchase-money at the end of ninety days, the commissioner should advertise and re-sell the land. It was ordered that out of the proceeds the judgment previously taken against the purchaser and his surety should be first paid, and that the residue should be brought into court to abide its further order.

From this order the purchaser has appealed, and the errors assigned bring into question the power of the court to order a re-sale on the facts stated in the several petitions.

The contention of the appellant is that King, who was surety for the purchaser, had no such relation to the case as entitled him to intervene by petition, and that as the commissioner might have proceeded to collect the money from the surety, or by a foreclosure of the vendor's lien and sale of

the land, his petition to re-sell should not have been entertained.

In respect to both positions taken we think he is in error. Prior to the code of 1852 in this State, as in England, tenants in common might have been compelled to make partition by writ at common law, or by proceedings in equity. The usual and most appropriate mode, however, was by a resort to the courts of equity. *Lease v. Carr*, 5 Blackf. 353; *Foust v. Moorman*, 2 Ind. 17; *Cox v. Matthews*, 17 Ind. 367.

Since the code of 1852 went into force, the distinction in pleading and practice in actions at law and suits in equity, except as to the right of trial by jury in cases which formerly were of exclusive equitable cognizance, no longer exists.

The result is that the jurisdiction formerly exercised by common law courts, and courts of equity, is now combined in the courts having jurisdiction of proceedings in partition. In the exercise of its chancery powers, the court may settle both the legal and equitable rights of all the parties to the record; both are equally within its cognizance and protecting power. *Martindale v. Alexander*, 26 Ind. 104; *Milligan v. Poole*, 35 Ind. 64; *Applegate v. Edwards*, 45 Ind. 329; *Ferris v. Reed*, 87 Ind. 123; *Elrod v. Keller*, 89 Ind. 382.

As the court in which this proceeding was pending had power to exercise chancery jurisdiction, it results that both the purchaser and his surety were subject to its control and protection. In 2 Daniell Ch. Pr. 1061 n., it is said: "Purchasers, under decrees in chancery, are regarded to a certain extent as parties to the suit, so as to be under the control of the court on the one hand, and its protection on the other. Thus, a purchaser under an order or decree in chancery may be compelled to complete his purchase by order on him in a summary way, without a bill, to pay or bring the money into court." *Mosby v. Hunt*, 9 Heisk. 675.

In the case of *Wood v. Mann*, 3 Sumner, 318, it was said by STORY, J., that the purchaser under a decree in chancery as well as his surety on a bond given to secure the deferred pay-

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ments of purchase-money, become parties to the proceedings. The learned judge said further : " The difficulty of the whole argument consists in treating the surety as a stranger to the proceedings ; whereas he is in fact a party to the proceedings under the sale, and has agreed to become so, as far as the payment of the purchase-money is concerned. It appears to me, that the predicament of a surety is not in the slightest degree distinguishable from that of a purchaser, or of any other person, who makes himself by his own undertaking a party to any of the proceedings of a court of equity." *In re Attorney General v. Continental Life Ins. Co.*, 94 N. Y. 199 ; *Dunham v. Minard*, 4 Paige, 441.

As King, by becoming surety for the purchase-money, became also a party to the proceedings in this case, he occupied such relation to it as that he could with propriety invoke the aid of the court for his protection.

The inquiry then remains, was it within the power of the court to order a re-sale of the property ? That it was seems to be abundantly settled both on principle and upon authority.

Sales in cases of this kind are made in pursuance of the order or decree of the court. The commissioner appointed is nothing more than the instrument through whom the sale is accomplished ; the order of the court is made effectual through his instrumentality. The transaction is, nevertheless, through the commissioner, with the court.

The securities given for deferred payments are, in effect, given to the court, and the right to make the securities effectual is enforceable by all the comprehensive powers of the chancellor. It could hardly be maintained that a chancellor, having in the course of a proceeding become possessed of a security for the performance of an order, duly made, would be obliged to resort to a common law, or other court, to make the security available. In such a case it was said, in *Wood v. Mann*, *supra*, " The appropriate remedy is merely a re-sale of the property."

Section 1202, R. S. 1881, provides that " Whenever it shall

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appear to the court that the purchase-money for the land sold has been duly paid, the court shall order such commissioner or some other person to execute conveyances to the purchasers," etc.

In this manner the court retains the title under its control as a security for the payment of the purchase-money. Since the purchaser becomes a party to the proceedings, and the court is invested with the power to enforce by a re-sale the security which the law requires it to retain, there would be neither necessity for, nor propriety in, a resort to any other proceeding than that which is pending before it, and to which all interested are parties.

In the case of *Long v. Weller*, 29 Grat. 347, the court say : "In judicial sales the court in some sense is regarded as the vendor, making sale by a commissioner as its agent, and the contract is treated as a contract substantially between the purchaser on one side and the court as vendor on the other. Where the title is retained, the proceeding for re-sale, whether by bill or in the more summary way, by rule, is a proceeding substantially by the court."

That a re-sale is the usual course of procedure, is maintained by the following, among other cases : *Stephens v. Magruder*, 31 Md. 168 ; *Warfield v. Dorsey*, 39 Md. 299 ; *Munson v. Payne*, 9 Heisk. 672 ; *Mosby v. Hunt*, *supra* ; *Long v. Weller*, *supra* ; *Thornton v. Fairfax*, 29 Grat. 669 ; *Anderson v. Foulke*, 2 Har. & G. 346 ; *Pettillo, Ex Parte*, 80 N. C. 50.

In the case last cited it was said : "In case the principal has become insolvent, the surety has an equity to require a re-sale, for his reimbursement if he has paid the debt, and for his protection if he has not ; and the equity extends to cases where there are reasonable grounds for apprehending the insolvency and consequent loss to the surety. * * * No good reason can be assigned why the court, under such circumstances as would entitle the surety to require a re-sale, may not make the order without coercion alike for the benefit of

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those to whom the fund belongs and for the relief of the surety himself."

In the case of *Miller v. Collyer*, 36 Barb. 250, the court says: "The remedy against a purchaser who refuses to complete a purchase under a decree or judgment of a court of equity, is by an application to the court to compel him to complete it, or to re-sell the property and hold him liable for the loss and the additional expenses." It was said in that case, "that when a person becomes a purchaser under a decree, he submits himself to the jurisdiction of the court as to all matters connected with the sale or with him in the character of purchaser." *Requa v. Rea*, 2 Paige, 339.

The case of *Richardson v. Jones*, 3 Gill & J. 163, is pressed upon our attention by the learned counsel for appellant. In the main the doctrine of that case is in harmony with our conclusion here. In so far as it seems to hold that a bond taken by a trustee appointed by the court to sell, in pursuance of its decree, was a contract with the trustee himself, enforceable only in a court of law, we think it is not in accord with the weight of authority.

Of course, there has been no forfeiture of the cash payment made by the purchaser, inasmuch as he is entitled to any surplus which may remain out of the purchase-price which may be realized at the second sale, after paying the amount due from him, with such costs as the court may adjudge against him.

There was no error in the proceedings of the court, and the order made by it is accordingly affirmed, with costs.

Filed Nov. 18, 1885.

No. 12,166.

GRAVES v. DUCKWALL.

SUPREME COURT.—*Practice.*—*Error Must Affirmatively Appear.*—A party who alleges error must present a record affirmatively showing it; otherwise all reasonable presumptions will be made in favor of the proceedings of the trial court.

Graves v. Duckwall.

From the Miami Circuit Court.

J. L. Farrar, J. Farrar, J. T. Cox, J. M. Brown and N. N. Antrim, for appellant.

E. T. Reasoner, R. P. Effinger and R. J. Loveland, for appellee.

ELLIOTT, J.—The appellant contends that the trial court erred in taxing costs against him. In our opinion the record does not affirmatively show any error.

The first paragraph of the appellant's complaint counts upon a contract, and it may be that the court rendered judgment upon that paragraph, and, as the amount of the recovery was only five dollars, it was proper to tax the appellant with costs. There is nothing in the record showing that the recovery was not based on the first paragraph of the complaint, and we must presume that the court did base its action upon that paragraph. It is a familiar rule that a party who alleges error must present a record affirmatively showing it, for otherwise all reasonable presumptions will be made in favor of the proceedings of the trial court.

The evidence is not in the record, and in its absence we can not say that the recovery was not upon the paragraph counting on a contract.

There are some answers to interrogatories which tend to show that the verdict was founded on the paragraph sounding in tort, but they by no means cover the entire case, and we can not overthrow the ruling of the court upon them. They are not sufficient to control the general verdict, nor are they sufficient to repel the presumption in favor of the ruling of the trial court.

Judgment affirmed.

Filed Nov. 7, 1885.

 McLain v. Wallace, Receiver.

No. 12,005.

McLAIN v. WALLACE, RECEIVER.

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| 149 | 546 |
| 103 | 562 |
| 153 | 52 |

BANK.—*General or Special Deposit of Money.*—Upon a special deposit of money a bank is merely a bailee, and is bound according to the terms of the deposit; but on a general deposit the money becomes the property of the bank, and the depositor's claim on the bank is merely for a like amount.

SAME.—*Insolvency of Bank.*—Upon the insolvency of a bank, its general depositors must be paid *pro rata*.

SAME.—“*Clerk.*”—The addition of the word “clerk” to the name of a general depositor does not make the deposit a special one, nor does it change the liability of the bank.

SAME.—*Trust Funds.*—The rule that a trustee may follow trust property as long as it can be traced has no application in an action to recover money on general deposit in a bank.

From the Marion Superior Court.

J. P. Baker, for appellant.

B. Harrison, W. H. H. Miller and J. B. Elam, for appellee.

BICKNELL, C. C.—The appellee, as receiver of an insolvent banking company, had possession of its property.

The appellant, who was the clerk of the courts of Marion county, filed his petition in said superior court, alleging that, as said clerk, he held money in trust which he deposited with said banking company, and that when said company became insolvent it held \$15,286.51 of said money, deposited by the appellant in the name of “Moses G. McLain, clerk,” with the knowledge and consent of said company, and subject to the order of the appellant as such clerk, and subject to the order of said court.

The petition prayed for an order directing the receiver to pay said sum of money to the appellant as clerk, or to pay it into court.

The appellee demurred to the petition for want of facts sufficient. The demurrer was sustained, and judgment was rendered thereon against the appellant. He appealed to the superior court in general term; there the judgment was affirmed, and he appealed to this court.

The State, *ex rel.* Staff, v. Barlow.

The question is, what are the rights of a bank depositor when the bank becomes insolvent? Deposits in bank are either general or special. Upon a special deposit the bank is merely a bailee, and is bound according to the terms of the special deposit; but on a general deposit, without special agreement, the money becomes the property of the bank, and the depositor has no longer any claim on that money; his claim is on the bank for a like amount of money. *Coffin v. Anderson*, 4 Blackf. 395; *McEwen v. Davis*, 39 Ind. 109. Upon the insolvency of a bank, its general depositors must be paid *pro rata*.

The rule that a trustee may follow trust property as long as it can be traced is not applicable to such a case.

The addition of the word "clerk" to the name of a general depositor does not make the deposit a special one, nor does it change the liability of the bank.

We need not decide what would be the rule as to trust funds specially deposited and actually on hand and capable of being traced.

The judgment of the court below ought to be affirmed.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment of the court below be and the same is hereby in all things affirmed, at the costs of the appellant.

Filed April 23, 1885; petition for a rehearing overruled Nov. 21, 1885.

No. 12,504.

THE STATE, EX REL. STAFF, v. BARLOW.

COUNTY COMMISSIONER.—*Term of Office*.—The term of office of a county commissioner consists of a period of three years, and, regardless of the time when the officer commenced service, the term expires with the expiration of such period.

SAME.—*Expiration of Term*.—*Qualifying*.—Owing to the change in 1869 from

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The State, *ex rel.* Staff, *v.* Barlow.

annual to biennial elections, a county commissioner whose term expired in August, 1869, held over until October, 1870. From 1870 till 1882 the commissioners successively elected held three years, each holding one year in his successor's term. The defendant was elected, and after qualifying took the office, in 1882. His successor, elected in 1884, after qualifying, in March, 1885, demanded admission into the office, but was refused. On *quo warranto* proceedings by the prosecuting attorney, against defendant,

Held, that defendant's term expired in August, 1884, and his right to continue in the office ceased when his successor qualified.

SAME.—Statute Construed.—The act of March 7th, 1885, Acts 1885, p. 69, regulating the term of office of county commissioners, is merely declaratory of what the law has been, except in fixing the first Monday in December as the commencement of the term.

From the Shelby Circuit Court.

F. S. Staff, Prosecuting Attorney, *E. P. Ferris*, *W. W. Spencer*, *J. S. Ferris* and *F. J. Van Vorhis*, for the State.

T. B. Adams, *L. T. Michener*, *E. K. Adams* and *L. J. Hackney*, for appellee.

MITCHELL, C. J.—By an information filed in the name of the State, on the relation of the prosecuting attorney for the Sixteenth Judicial Circuit, the right of William H. Barlow to continue in the office of county commissioner for the third district of Shelby county is challenged.

It is charged that Shelby county was organized into commissioners' districts pursuant to law on the 4th day of May, 1831, and that the districts are numbered respectively, numbers one, two and three; that under the provisions of the act of the General Assembly, approved January 19th, 1831, the first term in the third district ended August 8th, 1833; and that, calculating periods of three years thereafter consecutively, the last term, the one for which Barlow was elected, ended in August, 1884.

It is averred that from the establishment of the commissioners' districts, in 1831, until the end of the term, in 1869, the regular succession of terms for that district had been observed by the several incumbents. At that time, owing to the change from annual to biennial elections, under the act

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of 1869, Christopher Girton, who was elected in 1866, and whose term expired in 1869, held over until October, 1870. From 1870 until the autumn of 1884, the commissioners successively elected have held three years. In this manner each held one year in his successor's term.

The appellee, Barlow, was elected at the general election in November, 1882, and after qualifying took the office in December, 1882.

At the general election in November, 1884, George Cuskadon, who was eligible to the office, was elected and afterwards, on the 12th day of March, 1885, duly qualified. A few days later he presented himself, with his certificate of election, and oath of office duly endorsed thereon, to the board of commissioners, then in session, and demanded admission into the office. Barlow declined to surrender, and the other commissioners refused to recognize Cuskadon's right.

The court below sustained a demurrer to the information, and the question for decision is, had Barlow's term expired, or was he entitled to continue in the office until December, 1885?

In providing for the organization of boards of commissioners, the legislative policy has been apparent from the beginning; that policy was, and it still is, that the terms of county commissioners should be so regulated as that one member of the board should retire each year. This was provided for in the law of 1831, and in each successive enactment. Accordingly, in the adoption of the scheme, it was provided that one of the members elected at the first election should retire at the end of one year, another at the end of two, and the third at the end of three years; and that each successive commissioner elected should hold his office for a term of three years, and until his successor was elected and qualified.

It was held in the case of *Parmater v. State, ex rel.*, 102 Ind. 90, that the *term* applied to the office, and not to the person filling it. In that case it was held that a commissioner,

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who was elected in consequence of a vacancy having occurred by resignation, could hold only the unexpired term, and not, as was there contended, a full period of three years.

Under the facts stated in the information, it is apparent that from 1869 forward each commissioner held one year into his successor's term. This resulted in consequence of the fact that Girton, who it is alleged was elected in 1866, held four years, from 1866 to 1870. This in no manner changed the term as fixed by the Legislature. Each successive period of three years constituted a "term," and regardless of the time when the officer commenced service, the term expired with the expiration of each period of three years.

It is, therefore, indisputable that, as the law stood prior to the act of March 7th, 1885, the term for which Barlow was elected expired in August, 1884, and as his successor was elected, his right to continue in the office ceased when his successor qualified. Was his right to continue in the office extended by the act referred to?

This act, following a preamble which recognizes the uncertainty and confusion existing in relation to the commencement and ending of the terms of county commissioners, as such terms were being occupied, provides: "That the terms of office of county commissioners shall be three years, and shall begin on the first Monday in December, and the term of office of no two districts in the same county shall begin in the same year; and the year in which the term of office of each district shall begin shall be determined by calculating periods of three years from the end of the term for which the commissioner for the same district was elected upon the organization of the board of commissioners for the county; and each commissioner now holding his office, whose successor has not been elected, and each commissioner elect, who shall hereafter, but prior to the end of the regular term, as provided in this act, for the district for which he was elected, begin his service as commissioner, shall serve three years and to the end of the regular term of said district, and until his succe-

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sor is elected and qualified: *Provided*, that this act shall not be construed so as to lengthen the term of office of any commissioner now holding his office, whose successor has been elected and qualified, to the end of the regular term, as provided in this act," etc. Acts 1885, p. 69.

In order to determine whether this enactment has enlarged the right of the appellee, Barlow, it is only necessary to examine its constituent parts. It provides:

First. That the term of office of a county commissioner shall be three years, and shall begin on the first Monday in December.

Second. That the term of no two commissioners in the same county shall begin in the same year.

Third. That the year in which the term in each district shall commence shall be determined by calculating periods of three years from the end of the first term after the organization of the board in each county.

So far, except wherein it fixes the first Monday in December as the commencement of the term, this act is merely declaratory of what the law had been from the first. This was settled in *Parmater v. State, ex rel., supra.* As applied to all districts where the regular succession had been observed, it did not effect, nor was it intended to effect, any change whatever, except to fix the first Monday in December as the commencement of the term.

Recognizing the existing fact, however, that confusion had arisen in many cases on account of the change of time in holding elections, and from other causes, and for the purpose of restoring the regular succession in those cases, the act provided for two conditions, supposed to exist: *First.* Commissioners holding office whose successors had not been elected; and, *Second.* Commissioners then elect who might commence service at a period other than the beginning of a regular term. Concerning both of these classes, the provision is that they shall hold three years from the time they commenced, or shall commence service, and as much longer as shall carry them to

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the end of a regular term, and until their successors are elected and qualified.

Concerning commissioners holding after the expiration of the regular term, whose successors *had* been elected, it is implied they were to surrender to the commissioner elect. As to commissioners elect, since the term of those holding had expired, it is implied that they should be entitled to the office, upon qualifying according to law. Thus, the act seems to have made provision for every case that could have existed: The first, or declaratory part, for all cases where the regular order had been preserved; the second for all cases where persons may have been holding whose service commenced at an irregular period, and whose successors had not been elected; and the third for commissioners elect, under the previously existing order, who would be entitled to commence service at an irregular period, by reason of the expiration of the term into which their predecessors had been elected.

The proviso which follows simply declares that the act shall not be so construed as to authorize persons then holding irregularly, whose successors had been elected and qualified, to continue to the end of the next regular term. This had already been provided for impliedly by the provision that only commissioners then holding whose successors had *not* been elected should continue for three years, and until the end of the regular term, and that commissioners elect might enter into the office and do likewise.

The whole scope of the proviso is to prohibit commissioners then holding, or who might thereafter hold, from continuing in office beyond their regular term after their successor had been elected and qualified.

Barlow's right is not enlarged by either of the foregoing provisions. Under the law as it existed before the act of March 7th, 1885, his term expired after the general election in 1884. Cuskadon had been elected as his successor, and his right to the office was complete whenever he received his certificate and qualified, unless he abandoned the right. *State,*

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ex rel., v. *Bemenderfer*, 96 Ind. 374. Barlow was not, therefore, at the time of the passage of the act, a commissioner holding office, whose successor had not been elected. Cuskadon was a commissioner elect, and might commence service upon receiving his certificate and endorsing thereon his oath of office, the term into which he was elected having commenced August, 1884.

It is argued that the act of March 7th, 1885, is prospective, and, therefore, does not apply to the case in hand.

The principles of prospective and retrospective legislation, in the sense insisted upon, are not involved. If, however, the act was merely prospective, it would not aid the appellee. Under the law as it stood before the act referred to was passed, his term was at an end, and his successor was elected and qualified when he demanded the office, and unless Cuskadon's right to the office is defeated upon some other ground, he was clearly entitled to it without regard to the act of March 7th, 1885. As we have seen, this act did not defeat his right or enlarge that of the appellee.

It was error to sustain the demurrer to the information. Judgment reversed, with costs.

Filed Nov. 17, 1885.

 No. 12,253.

JONES ET UX. v. DARNALL.

HABEAS CORPUS.—*Custody of Infant.*—*Interest of Child Paramount Consideration.*—In a *habeas corpus* proceeding by a father to obtain the custody of his infant child from its maternal grandparents, the welfare of such child is the paramount consideration, and the order of the court must be made accordingly.

SAME.—*Supreme Court.*—*Weight of Evidence.*—*Exception to Rule.*—When a *habeas corpus* case is before the Supreme Court on the evidence, the sufficiency of such evidence to sustain the finding will be passed upon.

From the Montgomery Circuit Court.

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| 165 | 406 |

Jones *et ux.* v. Darnall.

G. W. Paul, J. E. Humphries, P. S. Kennedy, S. C. Kennedy and W. Reeves, for appellants.

A. D. Thomas and W. J. Darnall, for appellee.

HOWK, J.—This was a *habeas corpus* proceeding instituted by the appellee, Darnall, to obtain the custody of his infant son, Arthur J. Darnall, from the appellants, Jones and wife, who were the maternal grandparents of such infant. A writ of *habeas corpus* was duly issued, to which the appellants made return in writing, wherein they admitted that they were then in possession of Arthur J. Darnall, the infant son of the appellee and Susanna Belle Darnall, then deceased; but they said that Susanna Belle Darnall died about the 22d day of October, 1884; that appellee's infant son was born on the 28th day of September, 1884; that when Susanna Belle Darnall died, the appellee had no home for his infant son; that before appellee's wife died she requested her mother, one of the appellants, to take and raise such infant child; that appellants were in good circumstances, and were capable of raising such child; that soon after the death of his wife the appellee asked the appellants to take such child and raise it the same as their own child; that they said to him, they were afraid that after they had taken the child and become attached to it, he would want to take it away from them and give them trouble about the child; that the appellee then gave his word to appellants that he would never take the child from them, and upon his promise and agreement with them, they agreed to take and care for such child; that, with the full consent of appellee and at the dying request of their daughter, Susanna Darnall, and under the facts stated, the appellants took such child and had taken care of him, and his grandmother had given him the same care and attention she would have given her own child; that such child had to be fed with a spoon, and appellants got up in the night and fed and cared for him; that they had become attached to the child, and felt almost as near to it as they would if it were

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their own child; that they were willing the appellee might visit his child, and would treat him friendly and would teach the child to love and respect its parents; that appellee gave such child to appellants, and promised he would never take it away from them, and surrendered to them the care and possession of the child; that they had a good home for the child, and were willing and able to care for, support and maintain such child, and would treat him the same as their own child.

Appellants further said, that the appellee had no wife and no family, and worked by the month and went from place to place, and had no way to take care of such child; that appellee had no property, and since the death of his wife he had been drunk and at times used intoxicating liquor, and had a very violent temper; that the child then had a good and comfortable home with kind and affectionate grandparents, who were of good habits and were fit and proper persons to have control, care and custody of such child; that it was for the best interests of such child to be left with the appellants; and that the appellee, in his then condition in life, was not a fit and proper person to take charge of such child.

Appellee replied by a general denial to appellants' return, and, upon a hearing then had, the court found for the appellee. Over appellants' motion for a new trial, the court rendered judgment awarding the custody of the child to its father, the appellee.

In this court, the only error relied upon, in argument, for the reversal of the judgment below, is the overruling of the motion for a new trial. In this motion, the only causes assigned for such new trial or hearing were such as question the sufficiency of the evidence to sustain the finding and judgment below.

Appellants' counsel first insist very earnestly that the evidence showed an absolute gift by the appellee of his child to the appellants, which he could not afterwards revoke, rescind or annul, so as to entitle him to reclaim the custody

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and possession of the child from them. It may be fairly said, we think, that there is evidence in the record which tends, at least, to sustain the material facts stated by the appellants in their return to the writ, the substance of which return we have heretofore given. But as to some of these facts the evidence was conflicting; and it was the province of the circuit court to settle this conflict, and to determine which of the witnesses were the more worthy of belief. This court will not weigh evidence as a general rule, nor attempt to determine its preponderance. Considering all the evidence in the record, we may say, however, that it fails to show an absolute and unconditional gift by the appellee of his infant child to the appellants, or any intention on his part to yield or surrender to them his rights as a father to the custody and possession of the person of his child for any definite period of time.

In section 2518, R. S. 1881, in force since May 6th, 1853, after declaring that the guardian of an infant shall have the custody and tuition of such minor, and the management of such minor's estate, there follows this proviso: "*Provided, That the father of such minor (or, if there be no father, the mother, if suitable persons respectively) shall have the custody of the person and the control of the education of such minor.*" On behalf of the appellee, it is claimed in argument, that this statutory provision "ought to settle the question in this case," in his favor; and it has seemed to us, after reading the evidence, that the trial court must have taken the same view of this statutory provision as the appellee, in order to arrive at its finding and decision.

In the recent case of *Joab v. Sheets*, 99 Ind. 328, which was a suit by *habeas corpus* between the mother and father of an infant child, about the possession of the person of such child, this court said: "The question of the custody of the child was one in which the rights of the child were primarily involved, and where those of his parents were of secondary consideration merely." So, in *Church on Habeas Corpus*,

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section 442, it is said, in substance, that the modern and "more humane doctrine" has gone far to qualify the old rule, that the father had an absolute right to his children, superior to that of the mother and all others, and that the doctrine is now generally recognized that the interest of the child is the paramount consideration. The case at bar is very similar in its facts to that of *Sturtevant v. State, ex rel.*, 15 Neb. 459. In that case, as in this, the controversy was for the custody and possession of a motherless child, of but a few months' age, between the father and maternal grandparents of such child. The statute of Nebraska, in relation to the custody of the person of an infant child, is almost identical with the statutory provisions of this State, above quoted; and it was claimed in the case cited, as in this case, that the statute settled the question in favor of the absolute right of the father to the custody of the person of his infant child, as against its maternal grandparents. It was held by the Supreme Court of Nebraska in the case cited, notwithstanding their statute, that if it appeared to be more for the benefit of the infant to remain with its grandparents than to be put under the care of its father, the court should refuse to direct the infant to be delivered to him; and that, in such a controversy for the custody of the child, the order of the court should be made with a single reference to the best interests of such child.

In *United States v. Green*, 3 Mason, 482, which was a *habeas corpus* proceeding by a father to obtain the custody of his infant child from its maternal grandfather, STORY, J., said: "As to the question of the right of the father to have the custody of his infant child, in a general sense it is true. But this is not on account of any absolute right of the father, but for the benefit of the infant, the law presuming it to be for its interest to be under the nurture and care of its natural protector, both for maintenance and education. When, therefore, the court is asked to lend its aid to put the infant into the custody of the father, and to withdraw him from other persons, it will look into all the circumstances, and ascertain

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whether it will be for the real, permanent interests of the infant; and if the infant be of sufficient discretion, it will also consult its personal wishes. * * * It is an entire mistake to suppose the court is at all events bound to deliver over the infant to his father, or that the latter has an absolute vested right in the custody."

In Schouler's Domestic Relations, section 248, in declaring the American rule upon the question we are now considering, it is said: "In this country the doctrine is universal that the courts of justice may, in their sound discretion, and when the morals or safety or interests of the children strongly require it, withdraw their custody from the father and confer it upon the mother, or take the children from both parents and place the care and custody of them elsewhere. * * * The cardinal principle relative to such matters is to regard the benefit of the infant; to make the welfare of the children paramount to the claims of either parent. * * * The primary object of the American decisions is then to secure the welfare of the child, and not the special claims of one or the other parent." To the same effect substantially, see, also, the following cases: *Gishwiler v. Dodez*, 4 Ohio St. 615; *Dailey v. Dailey*, Wright, 514; *Cook v. Cook*, 1 Barb. Ch. 639; *Corrie v. Corrie*, 42 Mich. 509.

With this summary of the law applicable thereto, we come now to the consideration of the second ground insisted upon by appellants' counsel for the reversal of the judgment below. It is claimed by counsel that the evidence in the record conclusively shows that the best interests of appellee's child will not be subserved by removing it from the custody of the appellants and placing it in the custody of the appellee; and in this view of the evidence we concur with counsel. We have said that, as a general rule, this court will not weigh the evidence; but an exception to this rule is found in such cases as the one now before us. We have repeatedly held in *habeas corpus* cases, when the case is before us on the evidence, that it is our duty to examine and pass upon its sufficiency to sus-

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tain the finding and decision below. *Ex Parte Sutherlin*, 56 Ind. 595; *Ex Parte Walton*, 79 Ind. 600; *Ex Parte Kendall*, 100 Ind. 599.

In the case in hand, after carefully examining and considering all the evidence appearing in the record, we have reached the conclusion that the best interests of appellee's child imperatively require that it should be suffered to remain, during the tender years of infancy, at least, in the custody and care of its grandparents, and that the court should have refused to direct the delivery of such child to its father, the appellee. The evidence does not sustain the finding and decision of the court in appellee's favor, and the court erred, we think, in overruling the appellants' motion for a new trial.

The judgment is reversed, with costs, and the cause is remanded, with instructions to enter an order that the child, Arthur J. Darnall, in accordance with this opinion, shall remain with the appellants, and that appellee's petition be dismissed, at his costs.

Filed Sept. 18, 1885; petition for a rehearing overruled Nov. 21, 1885.

No. 11,850.

HOBBS ET AL. v. THE BOARD OF COMMISSIONERS OF TIPTON COUNTY.

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| 108 | 575 |
| 150 | 301 |

GRAVEL ROAD.—*Delay in Acting upon Petition.*—Mere delay of the board of commissioners in taking action upon a petition for the establishment of a free gravel road does not render proceedings afterwards had thereunder void.

SAME.—*Viewers Must Meet at Time Designated.*—*Notice.*—*Jurisdiction.*—Where the viewers appointed under a petition for a free gravel road do not meet at the time designated in the order appointing them, and in the notice given pursuant thereto, they can exercise no jurisdiction, and their acts are void.

SAME.—*Taxes.*—*Injunction.*—Injunction will lie to restrain the collection of taxes where the proceedings of the board of commissioners are void.

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From the Tipton Circuit Court.

J. W. Kern, B. F. Harness and J. Jones, for appellants.

R. B. Beauchamp, for appellee.

ELLIOTT, J.—The material averments of the appellants' complaint, exhibited in a condensed form, are these: On the 1st day of March, 1880, a petition was presented to the board of commissioners praying for the establishment of a free gravel road; no action was taken on this petition until the June term, 1881; at that time three viewers and a surveyor were appointed and ordered to meet on the 22d day of August, 1881; it was also ordered that the auditor give notice of the time and place fixed for such meeting, and that the viewers should make a report at the term of the commissioners' court following their meeting. The viewers did not meet at the time appointed, nor did they meet until October, 1881, and, instead of making the report, as directed, at the June term, 1881, they appeared, asked and obtained a continuance. No report was made at the December term, 1881, but, on the 9th day of that month, a report was prepared, and, on the 13th day of the same month, filed with the auditor. The plaintiffs had no notice of the time and place of meeting of the viewers and could not ascertain when they proposed to view the lands sought to be assessed, nor did the plaintiffs know at what time the viewers would make their report. On the 22d day of March, 1882, the report was submitted to the board and was approved; viewers were then appointed to view the lands and make assessments. At the same session the auditor was directed to give notice when the report of the viewers last appointed should be filed. On the 14th day of April, 1882, the contract for constructing the road was let, and an order made directing the issue of the bonds of the county to the amount of \$16,000. The viewers were directed to meet on the 15th day of May, 1882, and take an oath or affirmation to faithfully perform their duties. The viewers did not enter upon or view any of the lands of

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the plaintiffs, nor did they view or assess benefits upon all the lands included in the report of the viewers first appointed, nor did they view all the lands benefited. The assessments upon the lands of the plaintiffs are inequitable and unjust. The amounts of the assessments are specified, and averments made in detail showing that they are inequitable. Prayer for an injunction.

We do not concur with appellants' counsel that the delay in acting upon the petition renders the proceedings void. The plaintiffs were not injuriously affected by the delay, for they were not required to take notice of the petition until notified in the manner provided by law. If the delay had occurred after they were brought in by notice, a more serious question would arise.

The failure of the viewers and surveyor to meet at the time appointed presents a serious question. Of the time appointed for the meeting the statute imperatively requires that notice shall be given, and notice is always a fundamental requisite to the validity of such proceedings as those described in the complaint. The statute also provides that "It shall be the duty of the said viewers and surveyor or engineer to meet at the time and place specified by said commissioners." R. S. 1881, sections 5092, 5093.

We regard the publication of notice as essential to the validity of the proceedings, for unquestionably it is a jurisdictional matter. If the notice is essential, then a proceeding that frustrates its purpose and renders it fruitless can not be valid. The purpose of a notice is to afford a party his day in court, and to give him a hearing upon the matter upon which an action of a judicial character is to be taken.

If the viewers and the surveyor do not meet at the time designated, the notice subserves no useful purpose; quite as well have no notice at all as to permit the viewers to disregard it and hold their meeting at a time different from that designated in the notice. The land-owners were not bound

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to appear at a time fixed by the viewers, and of which they had no notice. The viewers could have no jurisdiction except such as the order of the commissioners conferred, and if they did not meet at the time designated in the order appointing them, and in the notice given pursuant to that order, they could exercise no jurisdiction at all. Viewers are appointed for a special purpose, invested with limited powers, and are not a permanent body. They have no continuous existence, and no regular terms; they are called into existence for a specific purpose, and are only authorized to act at a designated time and place. Notice of the time and place is indispensably necessary to their jurisdiction, for without notice they can not lawfully meet and transact business. If notice is essential to jurisdiction, then a meeting at a time different from that specified in the notice is unauthorized, and no valid act can be done. The want of notice, where notice is required in proceedings to levy a tax for the construction of a gravel road, saps the foundation of the proceedings, for without notice there is no jurisdiction, and where there is no jurisdiction the proceedings are utterly destitute of foundation. *Strosser v. City of Fort Wayne*, 100 Ind. 443, p. 456; *Wright v. Wilson*, 95 Ind. 408; *Campbell v. Dwiggins*, 83 Ind. 473; *Tyler v. State, ex rel.*, 83 Ind. 563; *Troyer v. Dyar*, 102 Ind. 396; *Jackson v. State, etc.*, *ante*, p. 250.

The failure to give notice is not a mere irregularity; it is a failure to do the thing that authorizes any action by the viewers. The notice is essential to their authority; without it they have no power to take a single step. If they meet at a time different from that specified in the notice, they meet without authority, and lacking authority they can do no valid act as against land-owners who may be affected by their action. Such a case as this is not within the decisions in *Cauldwell v. Curry*, 93 Ind. 363, and cases of that character, for the reason that the want of notice is not a mere irregularity.

The case is not within the rule declared in *Brown v. Goble*, 97 Ind. 86; *Stout v. Woods*, 79 Ind. 108; *McAlpine v.*

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Sweetser, 76 Ind. 78; *Hume v. Conduitt*, 76 Ind. 598; *Muncey v. Joest*, 74 Ind. 409. That rule is this: Where there is notice, although defective, the proceedings are not void. The question in the present case is, not as to the character and effect of the notice, for there was no notice of any kind authorizing a meeting in October, 1881. The notice required by section 5092 is the first one required, and upon it depends the jurisdiction of the matter. It is this notice which brings information to the land-owner that it is proposed to lay an assessment upon his land, and if no such notice is given, or if the viewers do not meet at the time designated, he can have no information of the proceedings against him. This is the notice that calls him into court, and without it he is not in court. If it calls him to meet the viewers at a designated time, and there is no meeting of the viewers, he is not bound to again, day by day, appear, but may regard the notice as having spent its force. The case is not at all similar to that of a court of a permanent character having regular terms, for the viewers have very narrow powers and very limited jurisdiction; they do not have regular terms nor continuous existence. They have no power to meet at any other time than that designated in the order and notice for the purpose of organization, and, whatever may be their authority after the first meeting and organization, they can not disregard the order and notice. They have no power to fix at their own pleasure the time and place of the first meeting. If not organized on the day fixed, they can not become a legal body without a new order and notice.

This case is to be carefully discriminated from cases where notice is given of the filing of the petition, for in such cases the notice given upon the filing of the petition will confer jurisdiction, and irregularities in subsequent proceedings would not make the proceedings void. Here, the notice which first brings the land-owners into court is that provided for by section 5092, and if that notice is not given, or

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if it is wholly disregarded, no jurisdiction is acquired. If the statute provided for notice of the filing of the petition, and one was given, then, disregard of subsequent notices would be irregularities not going to the question of jurisdiction. Once jurisdiction is acquired, errors and irregularities avail nothing on a collateral attack such as this, but where there is no jurisdiction the whole proceedings are a nullity.

Counsel for appellees says, that the Legislature has power to prescribe the kind of notice that shall be given, and refers us to *Scott v. Brackett*, 89 Ind. 413; *Wade Law of Notice*, 21; *Cooley Const. Law* (5th ed.), 499; *Cupp v. Board, etc.*, 19 Ohio St. 173, 182. We agree with counsel upon this proposition, but no benefit can be secured from it by the appellees. This we say, because the question is not as to the power of the Legislature, but as to the power of viewers who have wholly disregarded the order and notice which invested them with all the authority they possessed.

We do not question the decisions in the cases of *Coolman v. Fleming*, 82 Ind. 117, *Muncey v. Joest, supra*, *Million v. Board, etc.*, 89 Ind. 5, that the board of commissioners has general jurisdiction of the subject of free gravel roads. On the contrary, we affirm as we have often done, that these cases assert the true rule, but they do not bear upon this case, for here the point is that there was no jurisdiction of the person. Jurisdiction of the person is as essential as jurisdiction of the subject-matter, and that jurisdiction did not exist in this instance.

This case is radically different from cases where notice requisite to confer jurisdiction is given and jurisdiction attaches. In such cases the failure of the viewers to meet at the time appointed, or to report at the time designated, would not vitiate the proceedings. Nor would proceedings in such cases be erroneous if the time for meeting was changed by order of court. But the question here is very different from any that could arise in a case where jurisdiction had been acquired.

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Here the authority to meet and organize was limited to the time fixed in the order and notice. The board of commissioners itself can do no valid act, as has been expressly decided in cases like this, unless convened according to law. *Fahlor v. Board, etc.*, 101 Ind. 167; *Columbus, etc., R. W. Co. v. Board, etc.*, 65 Ind. 427.

The viewers could have no legal existence as a *quasi* judicial tribunal except by meeting and qualifying in a legal manner.

If the viewers had met according to law, and the appellants had once been brought within the jurisdiction of the board of commissioners, a very different case would have been presented. We have no doubt that parties once in court are bound to take notice of subsequent proceedings, and if they are irregular attack them by an appeal. But here the plaintiffs were not at any time in court, for the only notice which gave jurisdiction had spent its force, and the only way in which they could be required to again appear was by the giving of a new notice. The first notice was *functus officio*, when the time for a legal organization of the committee of viewers expired without any action having been taken upon the notice. It can make no difference that only forty days after the time fixed by the notice the viewers did meet and organize, for the principle is the same whether the first meeting takes place forty days, forty months, or ten years after the appointed time.

Injunction will lie to restrain the collection of taxes where the proceedings of the board of commissioners are void. *Fahlor v. Board, etc.*, *supra*; *Bishop v. Moorman*, 98 Ind. 1 (49 Am. R. 731); *Brown v. Goble, supra*; *Columbus, etc., R. W. Co. v. Board, etc.*, *supra*.

Judgment reversed.

Filed Nov. 17, 1885.

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No. 11,855.

**THE JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY
v. PATTERSON.**

EASEMENT.—*Servitude Imposed by Owner.*—*Severance.*—*Continuance of Use by Implication of Law.*—Where the owner of an estate imposes upon one part of it an apparently permanent and obvious servitude in favor of another, and at the time of severance of ownership such servitude is in use and is reasonably necessary for the fair enjoyment of the other, then, whether the severance is by voluntary alienation or by judicial proceedings, the use is continued by operation of law. *Aliter*, where the arrangement is merely temporary or provisional.

SAME.—*Mortgage.*—*Foreclosure.*—One who takes a mortgage on a lot upon which there is a house and appurtenances resting partly upon an adjoining strip of ground owned by the mortgagor, and which is fenced in with and forms a part of the same enclosure, but is not described in the mortgage, such mortgagee, on acquiring title by foreclosure and sale, takes by implication of law an easement to the use of so much of such strip of ground as is made reasonably necessary by the character of the servitude.

From the Marion Superior Court.

J. S. Turkington and *U. J. Hammond*, for appellant.

W. Patterson, for appellee.

MITCHELL, C. J.—This suit was brought by Patterson against the insurance company to quiet title to a strip of ground five feet in width in the city of Indianapolis. Shortly stated, the facts found by the court, necessary to present the question for decision, are as follows: On the 20th day of October, 1876, John Patterson was the owner of a parcel of ground, the proper description of which was, lots two, three, four, and five feet off the north side of lot five, in Brockway's subdivision of out-lots eighty-four and eighty-five, in Blackford's subdivision of out-lot numbered one hundred and fifty-four, in the city of Indianapolis. These several descriptions lay contiguous to each other, forming a body with a frontage of ninety-five feet on California street, extending back one hundred and fourteen feet. The ground was divided by fences into three separate parcels or enclo-

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tures, each having upon it a house with necessary appurtenances, the houses being numbered respectively 293, 297 and 301. Desiring to obtain a loan from the insurance company, Patterson made a written application in which he stated that he would give, as security, a mortgage on "Nos. 293, 297 and 301, on California street, land measuring ninety-five feet on the street, extending back one hundred and fourteen feet; containing — square feet; value \$75 per front foot; buildings, three dwelling-houses built of wood," etc. An appraisalment was made, the appraisers valuing the land at \$60 per foot, amounting to \$5,700, and the improvements at \$5,000. The company's agent examined the property with Patterson, who pointed out to him Nos. 293, 297 and 301, including the yards and appurtenances enclosed with each, and after such examination the agent advised that the loan be made on the security of the property. Patterson thereupon caused an abstract to be prepared and furnished the same to the attorney of the insurance company. On the abstract furnished the property was described as lots two, three and four, in the subdivision above mentioned. A mortgage was thereupon prepared by the company's attorney, in which the description on the abstract was followed; which omitted any mention of the five feet off the north side of lot five.

The mortgage was duly executed by Patterson and wife, and the loan made by the insurance company in the belief that the description in the mortgage covered the ninety-five feet, with the houses and appurtenances as pointed out. Subsequently, the debt falling due, the mortgage was foreclosed, the property sold under the decree and bid in by the insurance company for the full amount of its debt, interest and costs, which amounted to \$5,829.70. The decree and sale followed the description contained in the mortgage, the company all the while supposing that such description embraced the ninety-five feet, with the houses as above numbered, and the plats or enclosures with each, as they appeared. Patterson remained in possession until the year for redemption ex-

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pired, when the company received a sheriff's deed, and went into and still remains in possession of the whole, Patterson becoming tenant of No. 293.

It was found that the house on No. 293 rests upon some part of the north margin of the five-foot strip which was not embraced in the description as written in the mortgage and subsequent proceedings under it, and that some of the appurtenances to the house were also on this strip, and that the whole strip was fenced in with, and formed a part of, the yard and enclosure, but to what extent the house rests on this strip the court was unable to find from the evidence.

About the time the foreclosure proceedings were commenced, Patterson conveyed the five-foot strip to his mother, Nancy Patterson, in payment of a valid antecedent debt, and she afterwards conveyed it to the appellee, Clide S. Patterson, who paid nothing for it.

There was no attempt at any time to reform the mortgage, nor is there any claim that it should be reformed. There is no finding that Patterson was guilty of any fraudulent representation or concealment, except as the same may be inferred from the facts above stated.

The question now is as to the respective rights of the parties in the five-foot strip.

On behalf of the insurance company, it is claimed that because part of the house, No. 293, rested on the margin of this strip, and other parts of it were occupied by appurtenances to the house, and the whole of it formed a part of the yard and enclosure at the time the mortgage was made and the proceedings and sale under it were had, the whole strip, or at least an easement in it, passed to the purchaser under the mortgage. Counsel, stating their position, say: "If Patterson owned lot number four, and five feet off of the north side of lot five, and the dwelling and appurtenances upon lot four, and said five feet were all in one enclosure as one yard or parcel, and through, by and under him, appellant has derived title to lot four, and possession of the house, with the

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enclosed yard, or parcel, and appellee has not shown what, if any, part of said five feet is not occupied by said house and appurtenances (he having the burden), the plaintiff, deriving his subsequent title from said John Patterson, can not recover because the dwelling-house, well, coal-house, etc., constituted an *apparent easement*, to which said five feet was in servitude."

Counsel say further: "It is not sought to reform the mortgage, but to establish by facts and circumstances the location of the property sold at sheriff's sale, that is, finding lot four, you find the five feet enclosed with it, and the dwelling-house upon it and the five feet, and then find that the owner of both parcels conveyed them to different persons at different times, the house with the appurtenances remaining on both. We show by the fact that the five feet were necessary to the support and use of the house, and so were embraced in the mortgage and sheriff's deed to appellant."

On behalf of the appellee, it is contended that as neither the five-foot strip of land nor any interest in any part of it is embraced in the description contained in the mortgage, and the proceedings had under it, nothing passed by implication of law outside the line of the boundaries described.

Presumably, the mortgage contained the usual covenants, but as no mention was made in it of the land here in dispute, or of any right or interest in it, the question is, did any right to or interest in it pass by operation or construction of law?

Upon the subject of easements passing by implied grant, much discussion is found, and while substantial agreement exists as to general rules, considerable uncertainty prevails in their application to particular cases.

As applied to easements in respect of light and air, the subject has been considered and decided by this court. *Stein v. Hauck*, 56 Ind. 65 (26 Am. R. 10). We are not aware that the precise question here involved has received the consideration of the court before. The reasons which control the subject of implied grants, when applied to light and air, are not controll-

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ing when such grants are based upon necessity, or the use of actual, visible arrangements and appurtenances annexed to, or adopted by an owner for the apparent and permanent benefit and use of the estate. As a basis for the application of the doctrine, there must have existed a unity of seizin, and a disposition and arrangement of the several parts of one estate with relation to each other, followed by a severance in the ownership. During the unity of title, the owner may subject one of several tenements or adjoining parcels of land to such arrangements, incidents or uses, with respect to the other, as may suit his taste or convenience, without creating an easement in favor of the one as against the other. This is so because the owner can not have an easement in land of which he has the title. The inferior right is merged in the higher title. By the common law it is said to be extinguished by the unity of title. In the civil law it is lost by "confusion." By both, if the easement existed before the unity of seizin, it may revive upon a severance, or, if none existed, such arrangements may be adopted while the seizin is united, as that upon a severance an easement will be created by implication of law.

Where, during the unity of title, an apparently permanent and obvious servitude is imposed on one part of an estate in favor of another, which at the time of the severance is in use, and is reasonably necessary for the fair enjoyment of the other, then, upon a severance of such ownership, whether by voluntary alienation or by judicial proceedings, there arises by implication of law a grant or reservation of the right to continue such use. In such case, the law implies that with the grant of the one an easement is also granted or reserved, as the case may be, in the other, subjecting it to the burden of all such visible uses and incidents as are reasonably necessary to the enjoyment of the dominant heritage, in substantially the same condition in which it appeared and was used when the grant was made. *Lampman v. Milks*, 21 N. Y. 505; *Kieffer v. Imhoff*, 26 Pa. St. 438; *Pennsylvania R. R.*

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Co. v. Jones, 50 Pa. St. 417; *Phillips v. Phillips*, 48 Pa. St. 178; *McCarty v. Kitchenman*, 47 Pa. St. 239; Washb. Easements, pp. 56, *et seq.*, 619.

The learned author above cited says, p. 81, quoting from the note to *Pearson v. Spencer*, 1 Best & Smith, 571: "It may be considered as settled in the United States, that, on the conveyance of one of several parcels of land belonging to the same owner, there is an implied grant or reservation, as the case may be, of all apparent and continuous easements or incidents of property which have been created or used by him during the unity of possession, though they could then have had no legal existence apart from his general ownership."

So, also, it was said by Chancellor Kent: "Some things will pass by the conveyance of land as incidents appendant or appurtenant thereto. This is the case with the right of way or other easement appurtenant to land. * * And if a house or store be conveyed, every thing passes which belongs to, and is in use for it, as an incident or appurtenance." 4 Kent Com. 467.

In the case of *United States v. Appleton*, 1 Sumner, 492, it was said: "It is observable, that in this case reliance is placed on the language of the grant 'with all the ways,' etc. But this is wholly unnecessary; for whatever are properly incidents and appurtenances of the grant will pass without the word 'appurtenances,' by mere operation of law." *Morgan v. Mason*, 20 Ohio, 401; *Morrison v. King*, 62 Ill. 30; *Newman v. Nellis*, 97 N. Y. 285.

The application of the rule must depend upon the nature, arrangement and use of the estate, the relation of the parts to each other, and the existing degree of necessity for giving such construction to the grant as will give effect to what may be supposed to have been, considering the manner of the use, the reasonable intendment of the parties; the underlying principle in such cases being that, included in the grant of the principal, are all such privileges and appurtenances as are

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obviously incident and reasonably necessary to the fair enjoyment of the thing granted, substantially in the condition in which it is enjoyed by the grantor, unless the contrary is provided.

A mere temporary or provisional arrangement, however, which may have been adopted by the owner for the more convenient enjoyment of the estate, can not constitute the degree of necessity or permanency which would authorize the engrafting upon a deed, by construction, of a right to the enjoyment of something not within the lines described. To justify such construction, it must appear from the disposition, arrangement and use of the several parts, that it was the owner's purpose in adopting the existing arrangement to create a permanent and common use in the one part for the benefit of the other, or for the mutual benefit of both, and it must be reasonably inferable from the existing disposition and use that it was intended to be continuous, notwithstanding the severance of ownership. *Francies's Appeal*, 96 Pa. St. 200.

Where such arrangement is visible, and apparently designed to be permanent, and is valuable and reasonably necessary to the enjoyment of the parcel granted, the parties will be presumed to have contracted with reference to the condition of the property at the time of the grant, "and neither has a right, by altering arrangements then openly existing, to change materially the relative value of the respective parts." *Curtiss v. Ayrault*, 47 N. Y. 73. *Butterworth v. Crawford*, 46 N. Y. 349 (7 Am. R. 352); *Cave v. Crafts*, 53 Cal. 135.

The rule above stated was applied with some degree of liberality in the notable case of *Pyer v. Carter*, 1 H. & N. 916, the authority of which, although denied in the later case of *Suffield v. Brown*, 4 DeG. J. & S. 185, is nevertheless in principle generally accepted in this country, with some qualification as to the degree of necessity required in order to authorize the inference of a grant or reservation by implication. In the following cases it was held that nothing short of absolute necessity would authorize such inference: *Carbrey v. Willis*, 7

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Allen, 364; *Randall v. McLaughlin*, 10 Allen, 366; *Buss v. Dyer*, 125 Mass. 287; *Warren v. Blake*, 54 Maine, 276.

It may be inferred that the rule in *Pyer v. Carter*, *supra*, might have been looked upon with more favor by the learned courts, in the cases above cited, if, as in the case under consideration, it had been sought to apply it to grants of the dominant estate. *Dillman v. Hoffman*, 38 Wis. 559; Washb. Easements, p. 71. Whether this inference is justified or not, we think the weight of authority, in cases like this, sustains a rule less exacting than that of strict and indispensable necessity. *Henry v. Koch*, 80 Ky. 391 (44 Am. R. 484); *Cannon v. Boyd*, 73 Pa. St. 179; *Simmons v. Cloonan*, 81 N. Y. 557; *Ingals v. Plamondon*, 75 Ill. 118; *Rogers v. Sinsheimer*, 50 N. Y. 646; *United States v. Appleton*, 1 Sumner, 492; *Janes v. Jenkins*, 34 Md. 1 (6 Am. R. 300).

The degree of necessity is to be determined rather by the permanency, apparent purpose, and adaptability of the disposition made by the owner during the unity of title, than by considering whether a possible use can be made of the parcel granted, after a discontinuance of the right formerly exercised over the other. *Dunklee v. Wilton R. R. Co.*, 24 N. H. 489; *French v. Carhart*, 1 N. Y. 96.

Whether the continuance of the previous use is indispensable to the future enjoyment of the estate granted in the condition it was in when severed, the practicability and effect of new adjustments, and the expense involved in making them, while not conclusive, may properly be taken into account, not for the purpose of determining the necessity of a continuance of the use, but to illustrate the degree of probability that the purchaser, as a reasonable man, took the conveyance with the expectation that the existing use would be continued. The particular facts and the situation and disposition of the estate in each case must control.

The reasonable application of the doctrine, as we deduce it from the authorities, however, leads to the general conclusion that if the service imposed on one, during the unity

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of possession of two parcels of land, was of a character looking to permanency, and the discontinuance of such service would obviously involve an actual and substantial rearrangement of that part of the estate in whose favor the service was imposed, to the end that it might be as comfortably enjoyed as before, then such a degree of reasonable necessity would seem to exist as would raise an implication that the use was to be continued.

If, on the other hand, the arrangement was of an indifferent or probably temporary character, having no apparent adaptability to use for the several parts in the situation in which they are, and the continuance of which, while obviously detrimental to the one, would be of no peculiar value beyond mere convenience to the other, then no grant would be implied.

Within the foregoing principles, and upon the authority of the adjudications cited, it seems clear that so far as the house on lot four projected over and rested on the strip of ground in dispute, the grant of an easement to continue such use would be implied.

Assuming that both parties knew the exact boundaries, it could not have been within the intendment of either that the house should be moved, or a portion of the wall or overhanging parts shorn off.

It is also found by the court that other appurtenances to the house are located on the five-foot strip. The character of these is not disclosed in the findings. Being appurtenant to the house, presumptively they would pass with it. This presumption, however, may be rebutted by showing that they were of a temporary character, readily readjusted or replaced, or that their use was not essential to the comfortable enjoyment of the house in the condition it was in when mortgaged. If the strip in dispute was devoted to such use, as that, in order to render the house on lot four accessible by the usual and ordinary methods, substantial changes in the structure or in its arrangement would be involved, or its use in the

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usual and ordinary methods would be impaired unless such changes were made, to the extent that it was so used the use should continue.

As the conclusions thus reached render it necessary to reverse the judgment appealed from, and as we do not deem the question of estoppel involved in the record in its present condition, we give that question no further consideration.

As the judgment of the superior court quieted the title of the appellee in the whole strip, notwithstanding the fact found that the house rested in part on the margin of it, it is deemed at least to that extent erroneous, and is accordingly reversed, with costs, and remanded for a new trial.

Filed Sept. 15, 1885; petition for a rehearing overruled Nov. 21, 1885.

No. 12,155.

HELLER v. CLARK, ADMINISTRATRIX.

APPEAL.—*Action Commenced by Party and Continued by Administrator.*—*Civil Code Governs, and not Decedents' Estates Act.*—Where an action is commenced by one in his lifetime, to annul and enjoin the collection of a judgment, and prosecuted to final hearing after his death by his administrator, substituted as plaintiff, the right of appeal, and the manner and time of taking it, are governed by the civil code of practice, and not by the statute regulating the settlement of decedents' estates.

SUPREME COURT.—*Submission under Rule 39.*—*Failure to File Objections.*—*Waiver.*—The submission provided for in Rule 39 of the Supreme Court is a statutory or forced submission, brought about by operation of law, and by a mere failure to file objections to a submission under such rule a party does not waive any right which he would otherwise possess.

From the Henry Circuit Court.

J. H. Mellett and E. H. Bundy, for appellant.

W. R. Hough, for appellee.

Howk, J.—A written motion has been filed by the appellee to dismiss this appeal for the following causes, namely:

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| 103 | 591 |
| 132 | 109 |
| 103 | 591 |
| 137 | 535 |
| 103 | 591 |
| 147 | 614 |
| 103 | 591 |
| 150 | 96 |
| 103 | 591 |
| 155 | 577 |

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"1. Because such appeal was not taken and perfected within twenty days after the rendition of the judgment of the court below, as required by the statute in such cases made and provided;

"2. Because appellant did not file the transcript of the record of the Henry Circuit Court in such cause in this court within twenty days after the rendition of the judgment therein by such circuit court;

"3. Because appellant has filed no appeal bond in this cause, either in this court or in the Henry Circuit Court, or in the office of the clerk of either of such courts, as required by the statute in such cases; and,

"4. Because appellant has filed no appeal bond whatever in such cause, at any time or place."

This motion has been filed by the appellee upon the theory, of course, that the case at bar is one wherein the right of a party to appeal to this court, and the manner of taking such appeal, and the time within which the appeal must be taken and perfected, are each and all provided for, regulated and governed by the provisions of sections 2454 to 2457, R. S. 1881. We are of opinion, however, that the appeal in this cause is in no sense governed by the provisions of those sections of the statute. The suit was commenced in the court below on the 24th day of May, 1881, by one Meredith Walker, as sole plaintiff, against appellant, Moses Heller, and one William H. Thompson, then the sheriff of Hancock county, as defendants. The object of the suit was to obtain a decree of the court annulling and avoiding a certain judgment which Heller had, before that time, recovered against Meredith Walker and one Thomas L. Marsh, in the Hancock Circuit Court, and perpetually enjoining Heller and the sheriff aforesaid from collecting, or attempting to collect, such judgment, or any part thereof, or any execution issued thereon, of or from Meredith Walker. Pending this suit in the court below, the death of Meredith Walker, intestate, was suggested to the court, and that appellee, Catharine J. Clark, was the

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administratrix of such decedent's estate; and thereupon the court ordered that she be substituted as the plaintiff in this cause. Afterwards, on the 6th day of March, 1884, upon the hearing of this cause then had, a finding and decree were made and rendered herein in favor of the appellee, as prayed for in the original and supplemental complaint, and against appellant Heller and sheriff Thompson.

This appeal was taken by the filing of a certified transcript of the record, and appellant's assignment of errors endorsed thereon, in the office of the clerk of the Supreme Court, on the 9th day of February, 1885, and within one year after the rendition of the judgment and decree herein by the Henry Circuit Court.

In section 2454, R. S. 1881, it is provided that "Any person considering himself aggrieved by any decision of a circuit court, or judge thereof in vacation, *growing out of any matter connected with a decedent's estate*, may prosecute an appeal to the Supreme Court," etc. If it could be correctly said that the judgment and decree of the circuit court in the case in hand grew out of any matter connected with a decedent's estate, within the meaning of that expression as used in the statute, then it would be clear that appellee's motion to dismiss this appeal was well taken, and would have to be sustained. Because, in such case, the right of appeal would be governed strictly by sections 2454 to 2457, *supra*, and there was no compliance, nor any attempt at compliance, with the provisions of those sections on the part of appellant, nor was the appeal in fact perfected until more than eleven months had elapsed after the rendition of the judgment and decree by the Henry Circuit Court. In construing these sections of the statute, we have held, and correctly so, we think, that in any appeal authorized thereby, and taken thereunder, the appellant must perfect his appeal by filing a certified transcript of the record, in the office of the clerk of this court, at the latest, within twenty days after the decision, by which he

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considered himself aggrieved, was made or rendered by the circuit court, or judge thereof in vacation, unless "for good cause shown" such time has been extended by this court. *Yearley v. Sharp*, 96 Ind. 469; *McCurdy v. Love*, 97 Ind. 62; *Browning v. McCracken*, 97 Ind. 279; *Miller v. Carmichael*, 98 Ind. 236.

We are of opinion, however, that the judgment and decree of the circuit court from which this appeal is prosecuted can not be said with legal accuracy to be a decision, "growing out of any matter connected with a decedent's estate," within the meaning of the sections of the statute above cited, and that, therefore, this appeal is in no manner governed or controlled by any of the provisions of those sections. On the contrary, we think the judgment and decree appealed from were rendered in an ordinary civil action or suit in equity, instituted by Meredith Walker in his lifetime, under the provisions of the civil code, and prosecuted to final hearing after his death by the appellee as the administratrix of his estate, or personal representative. From the judgment and decree of the court, in such an action or suit, the right of appeal, the manner of taking it, and the time within which it must be taken, as we have frequently decided, are governed and controlled by the provisions of the civil code of practice, and not by the provisions of the sections, above cited, of the statute regulating the settlement of decedents' estates. *Rusk v. Gray*, 74 Ind. 231; *Willson v. Binford*, 74 Ind. 424; *Bake v. Smiley*, 84 Ind. 212, on p. 216; *Hillenberg v. Bennett*, 88 Ind. 540; *Dillman v. Dillman*, 90 Ind. 585.

In civil actions or suits, such as the one under consideration, it is provided in section 633, R. S. 1881, that appeals "must be taken within one year from the time the judgment is rendered," and in section 640, R. S. 1881, it is further provided that "such appeals may be taken by procuring from the clerk of the court a transcript of the record and proceeding in the suit, or so much thereof as is embraced in

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the appeal, and filing the same in the office of the clerk of the Supreme Court, who shall endorse thereon the time of filing, and issue a notice of the appeal to the appellee." The appeal in the case in hand was taken within the time prescribed by and conformably in all respects to these statutory provisions. Therefore, appellee's motion to dismiss this appeal is not well taken, and must be overruled.

Appellant's learned counsel have suggested, in argument, another reason why they think appellee's motion to dismiss this appeal ought not to be sustained; and that is, as we understand them, appellee's failure to file objections to the submission of the cause, as provided in the *third* paragraph of rule 39 of the rules of this court, should be held to be the equivalent, and to have the force and effect, of an agreement by her to such submission. Counsel say: "An order of submission, under rule 39 of this court, was entered September 30th, 1885, and no objections were made by the appellee under the *third* clause of such rule. We think this amounts to a waiver of the right to dismiss, even if cause existed." The *third* clause or paragraph of rule 39 is not open to and should not receive the construction which counsel place upon it. The submission provided for in such rule is a statutory or forced submission, brought about by mere operation of law, and it ought not be held, as it seems to us, that by his mere failure to file objections to such submission, either party agrees thereto or waives any right thereby which he would otherwise possess.

Appellee's motion to dismiss this appeal is overruled, at her costs.

Filed Dec. 12, 1885.

 Laboyteaux v. Swigart et al.

No. 12,195.

LABOYTEAUX v. SWIGART ET AL.

CONTRACT.—*Payment of Less than Whole Debt.*—*Consideration.*—Where one who is neither the debtor, nor under any legal or moral obligation to pay the debt represented by a judgment, agrees to pay a sum less than the whole, in consideration of the promise of another to pay the balance, such agreement is not within the rule that a debtor can not satisfy an uncontroverted debt, which is due, by the payment of a sum less than the whole amount; nor is it within the rule that a promise, the consideration of which is that another will do what he is already by law or contract bound to do, is without consideration.

SAME.—*Married Woman.*—*Husband's Debt.*—*Estoppel.*—*Subrogation.*—*Right of Action.*—*Election.*—L., a surety on a judgment against S., who was insolvent, agreed that if S.'s wife would sell her separate real estate, at a stipulated price, to M., the owner of an encumbrance thereon, and apply the excess over the encumbrance to the payment of the judgment, he would pay the balance. S. and wife, in pursuance of the contract, conveyed the real estate to M. and paid over to L. the excess. L. failed and refused to pay off the balance of the judgment. Suit by S. and wife to recover such balance.

Held, that the consideration upon which S.'s wife agreed to sell her real estate was, that the purchase-money should discharge the encumbrance and the judgment.

Held, also, that L., having received all the consideration he contracted for, is estopped to say there was no consideration for his agreement.

Held, also, that the fact that the balance of the judgment was paid by a co-surety will not release L. from the performance of his contract, such co-surety being subrogated to the rights of the judgment creditor.

Held, also, that L. having refused to perform his contract, S.'s wife could elect to treat the contract as rescinded to the extent of its non-performance, and the bringing of suit to recover such balance was such an election.

From the Henry Circuit Court.

J. Brown and *W. A. Brown*, for appellant.

J. W. R. Milliner, for appellees.

MITCHELL, C. J.—This action was commenced before a justice of the peace. When the cause came to the circuit court, a demurrer was refiled and overruled to the complaint, and it is now contended that this ruling was erroneous.

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| 108 | 596 |
| 136 | 131 |
| 136 | 465 |
| 108 | 596 |
| 136 | 597 |
| 103 | 596 |
| 148 | 99 |

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The complaint sets out, in substance, that at a given date Emma Swigart was the owner of a house and lot in the town of Newcastle, Indiana, which she and her husband, Jacob Swigart, Jr., had joined in mortgaging to L. P. Mitchell as security for a debt of \$800 which they owed him. Jacob Swigart, Jr., at the same time owed McDorman a debt amounting to \$342.15. This debt was in judgment, and the appellant Laboyteaux and Jacob Swigart, Sr., were liable as sureties for its payment.

The complaint avers that Jacob Swigart, Jr., was insolvent; that Laboyteaux agreed that if Emma Swigart would convey her property to Mitchell, who agreed to pay \$1,154 for it, and turn over to him the excess after paying the encumbrance thereon, he would pay off the McDorman judgment, upon which he and the elder Swigart were sureties. In pursuance of this agreement the conveyance was made to Mitchell by Mrs. Swigart and her husband. The amount of Mitchell's mortgage was deducted from the purchase-price, and the excess, \$207.29, turned over to Laboyteaux. This sum, with \$65 additional, he applied on the McDorman judgment, leaving \$65 of that judgment unpaid. Execution was then issued on the judgment and his co-surety, Swigart, Sr., was compelled to pay it. The complaint avers that Mrs. Swigart would not have conveyed the lot, and turned over the excess of money above the mortgage, but for the agreement of the defendant to pay off and satisfy the McDorman judgment. The suit is by Mrs. Swigart, her husband joining, to recover the \$65 which Laboyteaux refused to pay.

It is contended, that to the extent that the appellant agreed to pay more than the amount of money turned over to him by Mrs. Swigart, the agreement was without consideration, and that, therefore, he is not liable for refusing to perform it.

It is settled that where a debt, the amount of which is not controverted, is due, the receipt from the debtor of a sum less than the whole, upon an agreement to discharge the debt,

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is not a satisfaction, and the agreement to discharge can not be enforced. *Fletcher v. Wurgler*, 97 Ind. 223.

It is a general principle, too, that a promise to one to pay him if he will do that which by law or by contract he is already bound to do, is without consideration and can not be enforced. *Ritenour v. Mathews*, 42 Ind. 7.

The principles which control in such cases, however, are not applicable in this case. The debt, for the payment of which Mrs. Swigart made provision by the conveyance of her property, was not her debt. She was under no legal or moral obligation to pay it. She had the right to sell her property if she chose, and appropriate the excess after paying the encumbrance to her own use, instead of devoting it toward the liquidation of her insolvent husband's debt and the relief of his sureties. As she was neither the debtor nor under any legal or moral obligation to pay the debt represented by the judgment, her agreement to pay a sum less than the whole, in consideration of the agreement of the appellant to pay the balance, was not within the rule that a debtor can not satisfy an uncontroverted debt which is due, by the payment of a sum less than the whole amount. For the same reason, it was not within the other rule that a promise, the consideration of which is that another will do what he is already under contract to do, is without consideration.

The consideration upon which she agreed to sell her property was, that the purchase-price which she was to receive should discharge the mortgage and the judgment against her husband. It may be assumed that the purchaser was not willing to pay that much, and that she refused to sell for less. The appellant, rather than take the chance of paying more, agreed that if she would convey for the price Mitchell was willing to pay, he would, upon receiving the excess over the encumbrance, pay the balance and discharge the debt for which he stood as surety. Upon this consideration she conveyed away her property, and turned over \$207.29 of her

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money. She would neither have made the conveyance, nor turned over the money, but for the appellant's agreement. Having done both upon the faith of the agreement, it is too late after the appellant has accepted the money and relieved himself so far from the burden of the security debt, to say there was no consideration for the agreement to pay the balance. That was all the consideration he contracted for. The contract was one of a kind of which it may be said, there was no consideration for it at its inception, nor until it was performed on one side. When it was so far performed, however, that the appellant received all that he contracted for, the consideration was no longer in suspense. It attached and related back to its inception, and the contract became obligatory. He then came under a direct primary obligation to pay off the judgment according to his agreement. *Willets v. Sun Mutual Ins. Co.*, 45 N. Y. 45; *L'Amoureux v. Gould*, 7 N. Y. 349. Having by his failure cast the burden of paying part of the judgment on his co-surety, he is not thereby exonerated from performing his contract by paying the money to the person entitled to receive it.

It is said that Mrs. Swigart is not injured by the failure; that the McDorman judgment is paid off, and that if any one is injured it is Swigart, Sr., the co-surety, who paid it. But the judgment is not paid off. So far as one of the sureties paid it as surety, he is subrogated to the rights of the judgment creditor, and may enforce the judgment against her husband if he can.

What the co-surety's rights may have been with respect to the contract of appellant, if he had signified his purpose to avail himself of it before Mrs. Swigart elected to sue for its breach and to recover the money not appropriated according to the agreement, we need not determine. We think, however, that until the co-surety had taken some step indicating his willingness to avail himself of the benefit of the arrangement made between Mrs. Swigart and the appellant, she was in a position to recover the money which the appel-

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lant owed. The appellant having refused to pay according to his agreement, Mrs. Swigart had the election to treat the contract so far rescinded as to enable her to recover the balance which he agreed to pay as money due her. *Dotson v. Bailey*, 76 Ind. 434.

Bringing the suit to recover the money, after the appellant repudiated the contract, was an election on her part to treat it as rescinded to that extent, and the co-surety having paid the judgment without adopting the contract, if he could have adopted it before its rescission, left the appellant liable to the plaintiff. *Berkshire Life Ins. Co. v. Hutchings*, 100 Ind. 496, and authorities cited.

There was no error in overruling the demurrer to the complaint. The instruction upon which error is predicated involves the question already determined, and it need not, therefore, be further considered.

Judgment affirmed, with costs.

Filed Nov. 20, 1885.

END OF MAY TERM, 1885.

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5. *Same.—Consequential Damages.*—Municipal corporations are not responsible for consequential injuries resulting from the grading of streets, where the work is done in a careful and skilful manner. *Ib.*
6. *Same.—Permanent Improvement.—Damages to Real Estate.—Action.*—In an action for injury to real estate caused by the negligence of corporate officers in constructing a public work of a permanent character, as the grading of a street, all damages, past and prospective, can be recovered in one action. *Ib.*
7. *Same.—Former Adjudication.*—In such a case, all the damages must be recovered in one suit, and for fresh damages resulting from the original wrong, a second action can not be maintained. *Ib.*
8. *Same.—Answer.—Reply.—Demurrer.*—Where an answer avers that the injury complained of is the same as that declared on in the former action, and the record does not show them to be different, the averment will be taken as true on demurrer; if the causes of action are not the same, that fact must be replied. *Ib.*
9. *Same.—Nuisance.*—The improvement of a street by a municipal corporation is not a nuisance, though done in a negligent and unskilful manner; and hence the rule that the continuance of a nuisance will supply ground for successive actions, has no application. *Ib.*
10. *Injunction.—Taxpayer.*—A taxpayer of a municipal corporation may maintain an action to enjoin the unauthorized expenditure of corporate funds, or the making of an investment that will result in loss to the corporation. *City of Richmond v. Davis*, 449
11. *Same.—Discretionary Powers.*—While corporate officers may be enjoined from wasting corporate funds, they can not be enjoined from exercising a discretionary power as to the time, manner and plan of building structures for corporate purposes. *Ib.*

COLLATERAL ATTACK.

See HABEAS CORPUS, 1; JUDGMENT, 3, 15; OFFICE AND OFFICER, 4; TRUST AND TRUSTEE, 4.

COMMON CARRIER.

See RAILROAD, 9.

1. *Railroad.—Contract Limiting Liability.—Negligence.—Fraud.*—A common carrier may, by contract, limit his liability as an insurer, but he can not thus relieve himself from the consequences of his own negligence or fraud. *Rosenfeld v. Peoria, etc., R. W. Co.*, 121
2. *Same.—Fixing Value of Goods by Carrier.—When Binding upon Shipper.—Burden of Proof.*—In order that a common carrier may, by fixing the value of goods received for transportation, limit his liability, he must show that the shipper had knowledge of such fixing of value and for a sufficient consideration consented thereto, or that his statements and conduct justified the carrier in so fixing the value. *Ib.*
3. *Same.—Burden of Proof.*—Contracts limiting the amount of recovery will be construed most strictly against the carrier. The burden is upon the carrier to show any claimed limitation upon its common law liability. *Ib.*
4. *Same.—Bill of Lading.—Stipulation as to Measure of Liability.—Arbitrary Fixing of Value by Carrier.*—Where it is expressly stipulated in a bill of lading, that "in the event of loss or damage under the provisions of this agreement, the value or cost at the point of shipment shall

govern the settlement of the same," the insertion by the carrier, without the knowledge or consent of the shipper, of almost illegible abbreviations which are interpreted by the carrier to mean "Leaks and outs excepted, \$20 railroad valuation," will not bind the shipper, and he may recover the actual value of the goods at the point of shipment. *Ib.*

5. *Ownership of Goods Consigned.—Pleading.*—A complaint against a common carrier, alleging that it negligently failed to deliver certain goods consigned by the plaintiff, to his damage, is bad on demurrer, in the absence of an averment that the plaintiff owned the goods.

Pennsylvania Co. v. Poor, 553

6. *Same.—Presumption.*—The right of action against a common carrier, for the loss or damage of goods consigned, will be presumed to be in the consignee, in the absence of allegations showing the contrary. *Ib.*

COMMON SCHOOLS.

See SCHOOL FUND.

CONSIDERATION.

See CONTRACT, 2, 11, 12; COSTS; DEED; MARRIED WOMAN, 8; PROMISSORY NOTE, 1, 3; RAILROAD, 16.

CONSIGNOR AND CONSIGNEE.

See COMMON CARRIER.

CONSTITUTIONAL LAW.

See COUNTY COMMISSIONERS, 1; DRAINAGE, 10; OFFICE AND OFFICER, 1, 2; RECOGNIZANCE; SCHOOL FUND, 1.

CONTINUANCE.

See CRIMINAL LAW, 24.

1. *Sufficiency of Affidavit.—Sickness.*—A party who desires the postponement of a case which he knows is set for trial, should make application in due season, fully setting forth the causes upon which he asks the delay; and the trial court is not bound to continue a cause upon the general and indefinite statement in an affidavit that a party's absence is caused by sickness in his family. *McBride v. Stradley, 465*
2. *Same.—New Trial.*—Affidavits filed subsequent to the ruling on the application for a continuance can not be considered, except perhaps upon a motion for a new trial. *Ib.*

CONTRACT.

See COMMON CARRIER, 1 to 4; MARRIED WOMAN; MECHANIC'S LIEN; MORTGAGE, 1; PARTITION, 1; PROMISSORY NOTE; RAILROAD, 8, 9, 16, 17; REAL ESTATE, 1 to 3; SUBROGATION; TOWN; TRUST AND TRUSTEE, 1, 3 to 5; VENDOR AND PURCHASER.

1. *Presumption.*—Contracts, not alleged to be in writing, will be deemed to have been by parol. *Wolke v. Fleming, 105*
2. *Same.—Lease.—Statute of Frauds.—Consideration.*—Where, as part of the consideration of the sale and transfer of a lease, for ten years, of real estate, the assignee agreed "to assume the covenants, and pay the rent, agreed in said lease," such contract is not a promise to answer for the default of another, within the statute of frauds, but is an independent undertaking, founded upon a new and valuable consideration, for the benefit of a third person, and is valid. *Ib.*
3. *Same.—Part Performance.*—The doctrine of part performance has no application to contracts that can not be performed by either party within a year. *Ib.*
4. *Same.—Quantum Meruit.—Quantum Valebat.*—Where a person has rendered services, or transferred property, under a contract voidable

- under the statute of frauds, he may recover the value of the services or property under the *quantum meruit* or *quantum valebat*. *Ib.*
5. *Same.—Possession.—Performance.*—Where possession has been given under a contract, and there has been full performance on one side, such contract is not within the statute. *Ib.*
 6. *Same.—Part Performance.—Quere,* whether the doctrine of part performance does not apply to leases of real estate, so as to take such contracts out of the statute of frauds. *Ib.*
 7. *'Presumption that Parties Entering Into are Adults.*—When nothing appears to the contrary, it will be presumed that persons entering into an agreement are adults, and competent to contract. *Foltz v. Wert, 404*
 8. *Lease.—Contract to Sell at Expiration of Term.—Specific Performance.—Mutuality.—Equity.*—A complaint by H. alleged that on a certain date B., the defendant, leased to him certain real estate for the term of five years, with the agreement in the lease that B. would sell and convey by warranty deed, and H. should have the right to buy such real estate at the expiration of such lease, the price to be fixed by three appraisers, one to be chosen by each, and the third by the two so chosen; that under such contract H. took possession and in good faith placed valuable improvements on the property which could not be removed without total loss; that at the expiration of such lease H. notified B. of his election to buy such real estate, selected his appraiser, and in all respects was ready to comply with the contract on his part, but B. wholly refused to comply with the same. Prayer for specific performance, etc.
Held, that the complaint states a case for equitable relief, and is good on demurrer. *Herrman v. Babcock, 461*
 9. *New Promise.—Revival of Debt Discharged by Bankruptcy.*—The promise, by which a debt discharged by bankruptcy proceedings is revived, must be express, clear, distinct and unequivocal, in contradistinction to a promise implied from an acknowledgment of the justness or existence of the debt. *Meech v. Lamon, 515*
 10. *Same.*—A promise, in these words: "I do not intend you shall lose it, I will make it all right," is not a sufficient new promise to revive a debt discharged by bankruptcy. *Hubbard v. Farrell, 87 Ind. 215, criticised. Ib.*
 11. *Acceptance.—Performance.—Consideration.—Mutuality.*—Where a contract is signed by one only of the contracting parties, but is accepted by the other party, and affirmative acts constituting the consideration thereof are performed by the latter, it is the mutual and binding contract of both. *Chicago, etc., R. W. Co. v. Derkes, 520*
 12. *Payment of Less than Whole Debt.—Consideration.*—Where one who is neither the debtor, nor under any legal or moral obligation to pay the debt represented by a judgment, agrees to pay a sum less than the whole, in consideration of the promise of another to pay the balance, such agreement is not within the rule that a debtor can not satisfy an uncontroverted debt, which is due, by the payment of a sum less than the whole amount; nor is it within the rule that a promise, the consideration of which is that another will do what he is already by law or contract bound to do, is without consideration. *Laboyteaux v. Swigart, 596*
 13. *Same.—Married Woman.—Husband's Debt.—Estoppel.—Subrogation.—Right of Action.—Rescission.—Election.*—L., a surety on a judgment against S., who was insolvent, agreed that if S.'s wife would sell her separate real estate, at a stipulated price, to M., the owner of an encumbrance thereon, and apply the excess over the encumbrance to the payment of the judgment, he would pay the balance. S. and

wife, in pursuance of the contract, conveyed the real estate to M. and paid over to L. the excess. L. failed and refused to pay off the balance of the judgment. Suit by S. and wife to recover such balance. *Held*, that the consideration upon which S.'s wife agreed to sell her real estate was, that the purchase-money should discharge the encumbrance and the judgment.

Held, also, that L., having received all the consideration he contracted for, is estopped to say there was no consideration for his agreement.

Held, also, that the fact that the balance of the judgment was paid by a co-surety will not release L. from the performance of his contract, such co-surety being subrogated to the rights of the judgment creditor.

Held, also, that L. having refused to perform his contract, S.'s wife could elect to treat the contract as rescinded to the extent of its non-performance, and the bringing of suit to recover such balance was such an election. *Ib.*

CONTRIBUTORY NEGLIGENCE.

See NEGLIGENCE; RAILROAD, 2, 4 to 6; TELEGRAPH COMPANY, 11 to 13.

CONVEYANCE.

See CONTRACT, 8; DEED; EASEMENT; JUDICIAL SALE; MORTGAGE, 3; REAL ESTATE; VENDOR AND PURCHASER.

CORPORATION.

See CITY; COUNTY COMMISSIONERS, 3, 5, 6, 16; DEDICATION; DRAINAGE, 13; LIFE INSURANCE; MECHANIC'S LIEN; PROMISSORY NOTE, 7; RAILROAD; TELEGRAPH COMPANY; TOWN; TRUST AND TRUSTEE, 3.

COSTS.

See OFFICE AND OFFICER, 4; SUPREME COURT, 20.

Counter-Claim.—Breach of Warranty.—Promissory Note.—Consideration.—Action in Circuit Court.—Recovery of Less than \$50.—In an action in the circuit court on a promissory note for \$125, the defendant pleaded in defence that the consideration of the note was the price of a horse, and that, by reason of a breach of the warranty under which the sale was made, he was damaged, etc. There was judgment for the plaintiff for less than \$50.

Held, that the defendant's pleading was a counter-claim (section 350, R. S. 1881), and that under section 591, R. S. 1881, the plaintiff was entitled to recover costs. *Mills v. Rosenbaum, 152*

COUNTER-CLAIM.

See COSTS; PLEADING, 4; REAL ESTATE, 6.

COUNTY AUDITOR.

See MANDATE, 1; SCHOOL FUND; TAXES, 2, 3.

COUNTY CLERK.

See OFFICE AND OFFICER, 1 to 5.

COUNTY COMMISSIONERS.

See GRAVEL ROAD; HIGHWAY; INJUNCTION, 2; MANDATE, 1; SCHOOL FUND.

1. *Animals Running at Large.—Police Regulation.—Constitutional Law.*—The act of May 31st, 1852, authorizing county boards to determine what animals shall be allowed to run at large and pasture on the public commons and uninclosed lands, is not an infringement of section 21, art. 1, of the Constitution, in regard to the taking of the property of others without just compensation first paid or tendered, but confers a power in the nature of a police regulation. *Welch v. Bowen, 252*

2. *Same.—Power to Change or Repeal Order Continuing.*—The power to pass orders or regulations in respect to the running at large of animals, conferred on county boards by the act of 1852, is administrative in character, is continuing, and is not exhausted by being exercised once, and such boards may change, modify or repeal an order when once made, as often as the public interest may demand. *Ib.*
3. *Same.—Municipal Corporation.—Power to Change or Repeal By-Laws.—Vested Right.*—The power to pass by-laws, ordinances, or regulations affecting the government of a municipal corporation carries with it by implication the power to modify or repeal such by-laws, ordinances and regulations, unless the power is restricted in the law conferring the right, or unless such change or repeal would affect a vested right under an order or regulation lawfully adopted. *Ib.*
4. *Negligence.—Physician for Poor.*—Where it does not appear that a board of commissioners did not exercise care and diligence in the selection of a physician for the poor, there can be no negligence.
Summers v. Board, etc., 262
5. *Same.—Governmental Duties.—Principal and Agent.—Respondent Superior.*—Where the duties delegated to officers elected by public corporations are political or governmental, the relation of principal and agent does not exist, and the maxim of *respondent superior* does not govern. *Ib.*
6. *Same.—Police Power.*—Counties are instrumentalities of government, and are not liable for injuries caused by the negligence of the commissioners in the selection of an unskilful or incompetent physician for the care of the poor. *Ib.*
7. *Power to Change Location of County Institutions.*—The board of county commissioners has power to change the location of county institutions and to do all acts necessary to effect the change, and such power is a continuing one, not exhausted by a single exercise.
Platter v. Board, etc., 360
8. *Same.—Order of Discontinuance Before Selling County Poor Asylum.*—It is not necessary for the board to pass an order formally discontinuing the county asylum for the poor prior to selling such asylum, for the purpose of locating it elsewhere. *Ib.*
9. *Same.—Power to Sell County Property.*—Such board may sell property when in its judgment it is no longer required for county purposes. *Ib.*
10. *Same.—Ministerial Act.—Discretionary Power.—Special Session.*—An order for the sale of county property is a ministerial act, calling into exercise the discretionary powers of the board, and such order may be made at a special session and executed when the board is not in session. *Ib.*
11. *Same.—Delegating to Agent Power to Sell.*—The mere act of selling may be done by the county auditor at the direction of the board. *Ib.*
12. *Same.—No Appeal from Ministerial Act.*—Where the board exercises judicial functions in adversary proceedings, involving private rights, there is a right of appeal, but such right does not exist where such board acts in a purely ministerial or administrative capacity. *Ib.*
13. *Same.—Exercise of Statutory Power.*—Where the statute prescribes the mode of exercising a power, that mode must be adopted. *Ib.*
14. *Same.—Notice of Sale.—Terms.—Price of Property Must be Fixed by Board.*—Under the statute providing for the sale of county property by the board of commissioners, the notice of sale will be insufficient as to the terms upon which it is to be made, if it does not name the minimum price which it is the duty of the board to fix upon such property. *Ib.*

15. *Kind of Security Must be Specified.*—"Approved Security."—The notice of sale must also specifically state the kind of security which the purchaser will be required to give. It is not sufficient to designate it as a note with "approved security." *Ib.*
16. *Same.*—*Ratification.*—An act performed by a public corporation in violation of the terms of a statute can not be ratified. *Ib.*
17. *Same.*—*Estoppel of Public Officers.*—One who deals with public officers with limited statutory powers is bound to ascertain the scope of their authority, and he can not found an estoppel upon acts done by them in excess of their authority. *Ib.*
18. *Same.*—*Action by Board to Annul Sale Made by Previous Board.*—An action may be maintained by a board of commissioners to set aside an invalid sale of county property made by a previous board. *Ib.*
19. *Term of Office.*—The term of office of a county commissioner consists of a period of three years, and, regardless of the time when the officer commenced service, the term expires with the expiration of such period: *State, ex rel., v. Bartow, 563*
20. *Same.*—*Expiration of Term.*—*Qualifying.*—Owing to the change in 1869 from annual to biennial elections, a county commissioner whose term expired in August, 1869, held over until October, 1870. From 1870 till 1882 the commissioners successively elected held three years, each holding one year in his successor's term. The defendant was elected, and after qualifying took the office, in 1882. His successor, elected in 1884, after qualifying, in March, 1885, demanded admission into the office, but was refused. On *quo warranto* proceedings by the prosecuting attorney, against defendant, *Held*, that defendant's term expired in August, 1884, and his right to continue in the office ceased when his successor qualified. *Ib.*
21. *Same.*—*Statute Construed.*—The act of March 7th, 1885, Acts 1885, p. 69, regulating the term of office of county commissioners, is merely declaratory of what the law has been, except in fixing the first Monday in December as the commencement of the term. *Ib.*

COUNTY SUPERINTENDENT.

See OFFICE AND OFFICER, 6 to 9.

COUNTY TREASURER.

See TAXES, 1, 2.

COURTS.

See SUPREME COURT.

CRIMINAL LAW.

- See ABATEMENT, 1; DAMAGES, 4; HABEAS CORPUS, 1; INTOXICATING LIQUOR; OFFICE AND OFFICER, 2; RECOGNIZANCE.
1. *Indictment.*—*Endorsement by Foreman in Wrong Place.*—*Motion to Quash.*—It is error to quash an indictment merely because the name of the foreman is endorsed in the wrong place, viz., preceding the words "A true bill," instead of on a line with the word "foreman." *State v. Bowman, 69*
 2. *Motion for Discharge.*—*Bill of Exceptions.*—*Practice.*—*Supreme Court.*—A motion by a defendant to be discharged from custody, the affidavit supporting it, and the ruling of the court thereon, not being brought into the record by bill of exceptions or order of court, no question in relation thereto is presented for the decision of the Supreme Court. *State v. Cooper, 75*
 3. *Same.*—*When Bill of Exceptions not Necessary.*—It is only where all the

essential facts, necessary to show the ground upon which a ruling of the trial court was made, appear upon the face of the legal record, that no bill of exceptions is required to present such ruling for review on appeal. *Ib.*

4. *Same.—Copying Papers into Transcript.*—The mere copying of papers into the transcript by the clerk does not make them part of the record. *Ib.*
5. *Winning Money upon Game or Wager.—Pool.—Indictment.*—Under section 2081, R. S. 1881, an indictment charging, in substance, that the defendant did unlawfully play for money, to wit, ten cents, at and upon a certain game of pool, played by him with two named persons upon a billiard and pool table, and did unlawfully win from one of such persons, naming him, the sum of ten cents, etc., is sufficient. *Middaugh v. State, 78*
6. *Same.—Insufficiency of Evidence to Sustain Conviction.*—Evidence that the defendant and two other persons had played a game of pool in the defendant's saloon, that the amount played for was ten cents, and that one of such persons lost the game and paid for it, but not showing to whom, is not sufficient to sustain a conviction. *Ib.*
7. *Same.—Winning upon Game Implies Wager.*—Winning at or upon a game implies a wager of some kind. *Ib.*
8. *Indictment.—Signing by Prosecuting Attorney.—Printed Signature.*—Where the name of the prosecuting attorney, with the title of his office annexed, is printed at the bottom of an indictment with his consent, express or implied, instead of being written, it is a sufficient signing within the meaning of the statute, section 1669, R. S. 1881. *Hamilton v. State, 96*
9. *Same.—Presumption that Prosecutor's Name is Appended to Indictment by Authority.*—When the name of the prosecuting attorney is found appended to an indictment, the presumption is that it was so appended by his authority. *Ib.*
10. *Same.—Quere, whether the failure of the prosecuting attorney to sign an indictment would constitute such a defect as would tend to the prejudice of the substantial rights of the defendant upon the merits of the cause?* Section 1756, R. S. 1881. *Ib.*
11. *Killing Dogs.—Repeal of Statute.—Revivor.*—So far as section 2646, R. S. 1881 (enacted in 1852), allowed the killing of all dogs found off the premises of their owners, it was repealed by the act of 1881 (Acts 1881, p. 395), and it was not revived by the repeal of the latter act by the act of 1883 (Acts 1883, p. 148). *Dinwiddie v. State, 101*
12. *Same.—Act of 1883.—When Dogs May Lawfully be Killed.*—Under section 5 of the act of 1883 (Acts 1883, p. 149), a dog listed for taxation can not be lawfully killed except while engaged in committing damage to the property of others than its owner, or is known to be a dog that will kill or maim sheep. *Ib.*
13. *Same.—Value of Dog.—Evidence.*—In a prosecution under such statute, the value of the dog, if any, is not material. *Ib.*
14. *Exclusion of Evidence.—Error Compensatory.*—A party can not make available for the reversal of a judgment the exclusion of evidence, where, upon his objection, like evidence was excluded when offered by the other party. *Ib.*
15. *Embezzlement.—Indictment.—Lottery Ticket.—Basis of Prosecution.*—An indictment for embezzlement, charging that the defendant was the agent and employee of a certain person "for the purpose of collecting money on a certain lottery ticket," and then properly charging

the embezzlement of such money, but not more particularly describing the lottery ticket, is sufficient on motions to quash and in arrest of judgment, as such ticket is not the basis of the prosecution.

Woodward v. State, 127

16. *Same.—Embezzling Money Collected on Lottery Ticket.—Defence.*—In such case, it is no defence to the charge of embezzlement that the money feloniously converted was collected on a lottery ticket issued in the transaction of an unlawful business. *Ib.*
17. *Same.—Indictment.—Certainty.*—Under section 1755, R. S. 1881, the indictment is sufficient if the offence charged is stated with such a degree of certainty that the court may pronounce judgment, upon a conviction, according to the right of the case. *Ib.*
18. *Murder.—Sufficiency of Indictment.*—An indictment for murder, which charges that the killing was done by the defendant with a club, is not bad for failing to charge that the defendant held the club "in his hands." *Dennis v. State, 142*
19. *Same.—Formal Charge of Assault not Necessary in Indictment for Murder.*—An indictment for murder may be sufficient without charging the defendant in formal terms with the commission of an assault or an assault and battery on the body of the deceased. *Ib.*
20. *Same.—Bill of Exceptions.—Omission of Caption.—Reporter's Manuscript of Evidence.*—Where a bill of exceptions, containing the official reporter's long-hand manuscript of the evidence, has no caption or preliminary statement, but it appears from the statement signed by the judge and from a memorandum of the clerk preceding and his certificate following, that such manuscript was properly incorporated in a bill of exceptions, such evidence is a part of the record. *Ib.*
21. *Same.—Supplemental Motion for New Trial After Final Judgment.—When Should be Entertained.—Discretion of Court.*—It is within the discretion of the trial court during the term to entertain a supplemental motion for a new trial after final judgment; and in any case of felony, involving the life or liberty of the defendant, such motion, when founded upon matters occurring after final judgment, bearing strongly upon the guilt or innocence of the defendant and supported by affidavits filed therewith, should be heard. *Ib.*
22. *Same.—Material New Evidence.—What Sufficient for New Trial.—Confessions.*—Where a conviction for murder rests on the evidence of one jointly indicted with the defendant, a subsequent confession by such witness which destroys his previous evidence, and differs widely from his previous confessions, and materially affects the question of guilt, is a sufficient cause for a new trial. *Ib.*
23. *Perjury.—Indictment.—Language of Statute.—Words of Equivalent Meaning.*—An indictment for perjury is not bad for omitting the word "falsely," as used in the statute in connection with the swearing, if words conveying the same meaning are used. *State v. Anderson, 170*
24. *Same.—Affidavit for Continuance.—Facts Sworn to Must be Material.*—An indictment for perjury, under section 2006, R. S. 1881, predicated upon an affidavit for a continuance of a pending cause, must show by a specific averment or by the statement of the facts, that the swearing was touching matters material to the point in question. *Ib.*
25. *Same.—Description of Cause in Which Affidavit is Filed.—Motion to Quash.*—Where the indictment does not allege the materiality of the facts stated in the affidavit, and does not describe the cause in which such affidavit was made with sufficient certainty to show such materiality, it is bad on motion to quash. *Ib.*
26. *Obtaining Goods by False Pretences.—Indictment.*—In an indictment for

- obtaining goods by false pretences, it is sufficient to charge the ownership of the goods so obtained to be in a partnership by its firm name, under section 1753, R. S. 1881, and that the false pretences were made to the partnership by its firm name. *State v. Williams, 235*
27. *Same.—Belief in False Representations.*—Where the indictment in such case avers that said firm "relying on said false representations," etc., it sufficiently appears that the representations were believed to be true. *Ib.*
28. *Same.—Goods must be Obtained by False Pretences.*—An indictment averring that, for the purpose of obtaining "credit," certain false representations were made, and that by means of the representations thus made, the defendant did then and there obtain from, etc., "on credit," certain goods, etc., does not sufficiently show that the goods were delivered in pursuance of the alleged false representations, as the connection between the false pretences and the obtaining of the goods on credit is not shown. *Ib.*
29. *Malicious Trespass.—Real Estate.—Title.—Evidence.*—Where, in a prosecution for malicious trespass to real estate in tearing down and removing a fence thereon, there was no evidence tending to prove that the real estate upon which the fence stood belonged to the person named in the affidavit as owner, a conviction can not be sustained. *Hughes v. State, 344*
30. *Same.—Claim of Title.—Intent.*—Where the evidence shows that the trespass complained of consisted in the removal, by the employees of a railroad company, of a fence from real estate claimed by the company, to protect its rights, a charge for malicious trespass can not be rightfully prosecuted, in the absence of any malicious intent. *Ib.*
31. *Same.—Private Wrongs.*—The machinery of the criminal law can not be properly invoked for the redress of merely private grievances. *Ib.*
32. *Sending Obscene Letter.—"Paper" Includes Letter.*—The word "paper," as used in section 1997, R. S. 1881, prescribing the offence of sending lewd and obscene matter by mail, or otherwise, includes letters. *Thomas v. State, 419*
33. *Same.—Affidavit and Information.—Setting Out Letter.—Omission of Part.*—An affidavit and information charging the sending of a lewd and obscene letter is not bad because, in setting out the letter, a few words are omitted, if the omission is explained by alleging that the words were illegible. *Ib.*
34. *Same.—Copying Paper in Hæc Verba.—Quære, whether, under section 1751, R. S. 1881, it is necessary in a prosecution of this character to set out the obscene paper in hæc verba?* *Ib.*
35. *Same.—Evidence.—Handwriting.*—In the absence of direct evidence of the sending of the letter, proof that it and the address upon the envelope are in the handwriting of the accused is proper. *Ib.*
36. *Same.—Knowledge of Handwriting by Correspondence.—Production of Letters.*—One, by correspondence with another, may become so well acquainted with the latter's handwriting as to be competent to testify as to the genuineness of a writing claimed to be his; and to show the qualification of such witness the letters received by him in the course of the correspondence may be produced and identified. *Ib.*
37. *Same.—Corroborative Evidence.*—As corroborative of such witness the genuineness of the signature to a letter received by him in such correspondence may be testified to by another. *Ib.*
38. *Same.—Refreshing Memory of Handwriting by Reference to Other Papers.*—A witness who is shown to be acquainted with another's handwriting may, before or at the trial, refer to papers in his possession which he

- knows to be in the handwriting of the other, to refresh his memory before testifying. *Ib.*
39. *Same.—Guilty Knowledge.*—For the purpose of showing guilty knowledge on the part of the accused, another letter of similar character, shown to be in his handwriting, received by the same person in like manner, is competent evidence. *Ib.*
40. *Same.—Harmless Variance.—Practice.*—Immaterial and harmless variances between the original letter as read in evidence, and the copy set out in the affidavit and information, are not, in a case of this kind, available for the reversal of the judgment. *Ib.*
41. *Same.—Defendant as Witness.—Cross-Examination.*—Where the defendant goes upon the stand as a witness in his own behalf, and denies the offence charged against him, he may be cross-examined upon all facts relevant and material to that issue. *Ib.*
42. *Same.—Expert Witness.—Comparison of Handwriting.—Testing Accuracy of Expert.*—To test the accuracy of an expert witness, who gives an opinion as to handwriting upon a comparison of a genuine with the disputed writing, he may be asked on cross-examination whether the latter and another writing not admitted to be genuine are in the same handwriting. *Ib.*
43. *Punishment of One Guilty of Murder in First Degree Must be Fixed by Jury.—Supreme Court.—Appeal.—Practice.*—In cases of murder in the first degree, if the court fixes the punishment without the intervention of a jury, it is erroneous, but even when the error is presented on appeal, the Supreme Court can only reverse the judgment, and remand the cause with instructions to submit the question of punishment to the discretion of a jury. *Lowery v. Howard, 440*
44. *False Pretences.—Evidence.*—An indictment for obtaining a loan of money by false pretences charged that the defendant falsely represented that he was the owner of a certain amount of stock in a manufacturing company; that he was solvent and able to pay all his debts, which did not exceed a certain sum; that he was largely indebted to certain named persons in specified amounts, and also "owed other debts, the amount of which, and the persons to whom they were due, were to the grand jurors unknown." The indictment did not negative the representations of solvency, nor charge that the defendant, in direct terms, represented that such stock was unpledged. *Held*, that it was not error to exclude evidence, offered by the State, that the stock was pledged to secure an indebtedness, due and unpaid, exceeding its value.
- Held*, also, that under the general averment of an indebtedness not specifically set out, the testimony of one not named in the indictment, that the defendant owed him a certain sum at the time the representations were made, was admissible. *State v. Long, 481*
45. *Same.—Previous Statements to Third Person.—Admission.*—In such case evidence that not long prior to the making of the representations complained of, the defendant made similar representations to a third person, and afterwards admitted their falsity, was admissible, as tending to prove the untruth of the statements charged. *Ib.*
46. *Conviction of Simple Mayhem or Assault and Battery, Under Indictment for Malicious Mayhem.*—Under an indictment for malicious mayhem, the defendant may, if the evidence warrant it, be convicted of simple mayhem, or of an assault and battery. Sections 1834 and 1835, R. S. 1881. *State v. Fisher, 530*
47. *Felonious Intent.—Evidence.*—The State is not required to sustain a charge of felonious intent by direct evidence. It is sufficient if the

evidence is such as will satisfy the triers, beyond a reasonable doubt, of such intent. *Padgett v. State, 550*

48. *Same.—Supreme Court.—Weight of Evidence.*—The Supreme Court will not disturb a finding on the weight of the evidence. *Ib.*
49. *Same.—Arrest of Judgment.*—The second statutory cause for arrest of judgment (section 1843, R. S. 1881) presents no question as to the failure of the grand jury to return the indictment into open court. *Ib.*
50. *Same.—Return of Indictment into Open Court.*—The record shows that the grand jury returned into open court seven indictments, each signed by the prosecuting attorney and properly endorsed by the foreman, and numbered 1740, 1743, etc., and that they were duly examined and filed. Indictment No. 1743 is set out, with all its endorsements, as the indictment against appellant.

Held, that a return is sufficiently shown. *Ib.*

DAMAGES.

See ACTION; ATTACHMENT, 1; CITY, 1 to 9; COMMON CARRIER; ESTOPPEL, 1; EVIDENCE, 2, 6; NEGLIGENCE; OFFICE AND OFFICER, 2; PARENT AND CHILD; RAILROAD, 13 to 15; TELEGRAPH COMPANY, 15.

1. *Statutory Damages for Death.—Action by Personal Representative.—Complaint.*—A complaint by an administrator against a railroad company, to recover damages for the death of his intestate, must, to show a cause of action, allege that the latter left surviving him either a widow or children, or next of kin.

Stewart v. Terre Haute, etc., R. R. Co., 44

2. *Same.—Arrest of Judgment.*—In the absence from the complaint of such allegation, the judgment will be arrested on motion. *Ib.*
3. *Transfer of Claim.—Injuria sine Damno.*—The transfer of a just debt to the jurisdiction of another State, where, by appropriate judicial proceedings, its collection was enforced with greater facility and more effectually than could have been done, if at all, in this State, is not an injury for which damages may be recovered.

Uppinghouse v. Mundel, 238

4. *Same.—Statute Construed.*—The statute declaring such a transfer to be a misdemeanor, R. S. 1881, section 2163, was enacted to promote the public welfare, and not to redress merely private grievances. *Ib.*
5. *Assault and Battery.—Measure of Damages.—Instruction.*—In an action by a woman for damages resulting from an indecent assault and battery, it is not error to instruct the jury, that while exemplary damages can not be given, the jury, in arriving at compensatory damages, are not necessarily restricted to the naked pecuniary loss, but may allow such damages as are the direct result of the act complained of, and for injury to reputation, social position, physical suffering, mental anguish, sense of shame, humiliation and loss of honor.

Wolf v. Trinkle, 355

6. *Same.*—In such case a new trial will not be granted for excessive damages unless they are so clearly excessive as to indicate that the jury acted from prejudice, partiality or corruption, or were misled as to the measure of damages. *Ib.*
7. *Action for Personal Injury Does not Survive.—Malpractice.—Cases Limited.* Under section 282, R. S. 1881, an action against a surgeon for malpractice to recover for an injury to the person, in whatever form it may be brought, does not, on the death of the defendant, survive against his personal representative. *Staley v. Jameson, 46 Ind. 159, and Burns v. Barenfield, 84 Ind. 43, limited.* *Boor v. Lowrey, 468*

DECEDENTS' ESTATES.

See PARENT AND CHILD, 2; PRACTICE, 17; TAXES, 1.

1. *Sale of Real Estate by Administrator.—Appeal.*—The proceeding for the sale of real estate by an administrator is regulated exclusively by the act for the settlement of decedents' estates, and an appeal by an aggrieved party must be taken under the provisions of such act.
Rinehart v. Vail, 159
2. *Same.—Filing Appeal Bond and Transcript.—Time.—Dismissal.—Practice.*—Under sections 2454 and 2455, R. S. 1881, and the amendment of 1885 (Acts 1885, p. 194), an appeal bond must be filed, except where the administrator appeals, within ten days from the date of the decision, and the transcript must be filed within thirty days from the filing of the bond, unless, for good cause shown, the Supreme Court shall direct such appeal to be granted, on the filing of a bond, within one year; otherwise the appeal will be dismissed. *Ib.*
3. *Jurisdiction to Grant Letters of Administration Statutory.*—The jurisdiction of a court to grant letters of administration on a decedent's estate is derived from the statute, and can only be exercised in the cases provided for thereby.
Croston v. Renner, 223
4. *Same.—Discretion of Court.—Power to Revoke Letters Wrongfully Issued.*—Whenever a court has issued letters of administration which are not authorized by the express provisions of the statute, such court may, of its own motion, upon the application of any person interested, or upon the suggestion of an *amicus curiæ*, revoke or set aside the letters so issued, such issue being *coram non judice* and void. *Ib.*
5. *Same.—Administrator de bonis Non.—Statute Construed.—Final Settlement.*—Sections 2240 and 2254, R. S. 1881, only authorize the courts to issue letters of administration *de bonis non* where a vacancy occurs in the administration of an estate before the final settlement thereof; and so long as the final settlement of an estate remains in full force, letters of administration *de bonis non* can not be issued. *Ib.*

DECLARATIONS.

See EVIDENCE, 3 to 5.

DEDICATION.

1. *Passive Acquiescence, with Knowledge, in Use of Uninclosed Lot in Town for Street Purposes.*—Mere passive acquiescence, with knowledge, by the owner of an uninclosed and unimproved lot in a town or city, in its use by the public for street or highway purposes, until such time as he may be able and willing to improve the same, does not constitute a dedication.
Tucker v. Conrad, 349
2. *Same.—Evidentiary Facts.—Intended Dedication.*—Evidentiary facts, tending to prove an intended dedication, or from which it might possibly be presumed, are not themselves such an intended dedication. *Ib.*
3. *Same.—User.—General Highway Law.*—It seems that the provisions of section 5035, R. S. 1881, in relation to highways by user, are not applicable to the public streets of a town or city. *Ib.*

DEED.

See REAL ESTATE; VENDOR AND PURCHASER.

Delivery.—Acceptance.—Quietng Title.—Conveyance of Parent to Infant Child.—Presumption.—Where, in an action by a father against his daughter to set aside a deed and quiet title, the facts undisputed are, that the father, without any money consideration, and without the knowledge of the grantee, conveyed to his daughter, a child six and one-half years old, living with her father, by deed in fee simple, the real estate in

controversy, and shortly thereafter caused said deed to be recorded, it will be presumed that the deed was delivered to, and accepted by, the grantee. *Vaughan v. Godman*, 499

DELIVERY.

See DEED.

DEMAND.

See STATUTE OF LIMITATIONS, 5, 6; TAXES, 7.

DEPOSITOR.

See BANKS AND BANKING.

DESCRIPTION.

See JUDGMENT, 10; MORTGAGE, 2.

DEVISE.

See TRUST AND TRUSTEE, 2 to 5.

DILIGENCE.

See TELEGRAPH COMPANY, 8.

DISCRETION.

See CITY, 11; COUNTY COMMISSIONERS, 10; CRIMINAL LAW, 21; DECEDENTS' ESTATES, 4; INSTRUCTIONS TO JURY, 2.

DOGS.

See CRIMINAL LAW, 11 to 13.

DOMESTIC RELATIONS.

See GUARDIAN AND WARD; HABEAS CORPUS, 2; MARRIED WOMAN; NEGLIGENCE; PARENT AND CHILD.

DRAINAGE.

1. *Dismissal of Petition.—Practice.*—To present any question as to a ruling upon a motion to dismiss the petition in a drainage proceeding, such motion must be made part of the record. *Williams v. Stevenson*, 243
2. *Same.—Amendment of Petition after Filing Report.*—Under section 4278, R. S. 1881, the circuit court had authority to allow an amendment of the petition after the filing of the report of the drainage commissioners. *Ib.*
3. *Same.—Practice.—Supreme Court.*—To save any question for decision in the Supreme Court as to the proposed amendment, the objecting party should require its nature to be shown at the time leave to amend is asked. *Ib.*
4. *Same.—Waiver.*—Where an amended petition is filed without objection, an assignment of error in the Supreme Court, that the trial court erred in permitting it to be filed, presents no question. *Ib.*
5. *Same.—Notice.—Affidavit.—Omission of Jurat.—Power of Court to Hear Evidence and Order Officer to Affix Jurat.*—Where no jurat is attached to the affidavit as to the posting of notices in a drainage proceeding, the trial court may subsequently hear evidence that such affidavit was in fact sworn to at the proper time before the clerk, and order that officer to affix his jurat thereto as of that date. *Ib.*
6. *Same.—Weight of Evidence.*—The Supreme Court will not reverse a judgment upon the weight of the evidence. *Ib.*
7. *Pleading.—Complaint to Enforce Ditch Assessment.—Notice.*—A complaint to enforce the collection of a ditch assessment, which fails to allege that defendant had notice of the proceedings, or that any notice whatever was given, is bad on demurrer; and the filing of a copy of the

proceedings as an exhibit, from which it appears that due notice was given, will not make the complaint good. *Jackson v. State, etc., 250*

8. *Same.—Exhibits.*—Instruments which are not the foundation of a pleading should not be made exhibits, and, if they are, they can not be deemed a part of the pleading. *Ib.*
9. *Notice of Petition.—Injunction.—Pleading.*—An averment in a complaint to restrain the construction of a ditch and the collection of an assessment, that the plaintiff "never had any notice whatever of the proposed drainage, or of any proceedings under said petition, and never had any opportunity afforded it to appear and contest the same," is not a sufficient averment of the failure to give the statutory notice required in such proceedings. *Baltimore, etc., R. R. Co. v. North, 486*
10. *Same.—Constitutionality of Act of 1881.*—The drainage act of 1881 is a valid and constitutional exercise of legislative power. *Ib.*
11. *Same.—Appropriating Land Taken for One Public Use to Another.*—Lands once taken for a public use can not, under general laws, without an express act of the Legislature for that purpose, be appropriated by proceedings *in invitum* to a different public use. *Ib.*
12. *Same.—Legislative Intent.*—A legislative intent to subject lands devoted to a public use, already in exercise, to one which may thereafter arise, will not be implied from a grant of power, made in general terms, as in the drainage laws of this State, without special reference to an existing necessity for the subsequent use, where it appears that both uses can not stand together, and the latter, if exercised, will greatly endanger the exercise of the former. *Ib.*
13. *Same.—Railroad.—Right of Way.—Power to Establish Drain Upon.*—The circuit court has no power to establish and order the construction of a ditch upon the right of way of a railroad company. *Ib.*
14. *Notice.*—Where notice of an intention to file a petition for drainage is of the character prescribed by the statute, it is sufficient. *Carr v. State, etc., 548*
15. *Same.—Need not be Formally Approved by Court.*—Where the court acts upon the notice, no formal order approving it is necessary. *Ib.*
16. *Same.—Sufficiency of.*—Ordinarily, it is sufficient to serve notice on the person who is described in the petition and is named on the tax duplicate as the owner. *Ib.*
17. *Same.—Docketing.—Waiver.—Practice.*—A failure to note on the petition the day for docketing the same is a mere irregularity, and if not objected to within three days after it is docketed, the objection is waived. *Ib.*

EASEMENT.

See REAL ESTATE, 4, 6.

1. *Servitude Imposed by Owner.—Severance.—Continuance of Use by Implication of Law.*—Where the owner of an estate imposes upon one part of it an apparently permanent and obvious servitude in favor of another, and at the time of severance of ownership such servitude is in use and is reasonably necessary for the fair enjoyment of the other, then, whether the severance is by voluntary alienation or by judicial proceedings, the use is continued by operation of law. *Aliter*, where the arrangement is merely temporary or provisional. *John Hancock M. L. Ins. Co. v. Patterson, 582*
2. *Same.—Mortgage.—Foreclosure.*—One who takes a mortgage on a lot upon which there is a house and appurtenances resting partly upon an adjoining strip of ground owned by the mortgagor, and which is fenced in with and forms a part of the same enclosure, but is not described in the mortgage, such mortgagee, on acquiring title by

foreclosure and sale, takes by implication of law an easement to the use of so much of such strip of ground as is made reasonably necessary by the character of the servitude. *Ib.*

EJECTMENT.

See REAL ESTATE, ACTION TO RECOVER.

ELECTION.

See COUNTY COMMISSIONERS, 19 to 21; TOWN, 1.

EMBEZZLEMENT.

See CRIMINAL LAW, 15, 16.

EQUITY.

See CONTRACT, 8; JUDGMENT, 13, 14; MORTGAGE, 1; PARTITION, 1, 2; PARTNERSHIP, 2; PRACTICE, 9, 10; REAL ESTATE, 1; TRUST AND TRUSTEE, 5; VENDOR AND PURCHASER, 2.

ESTOPPEL.

See CONTRACT, 13; COUNTY COMMISSIONERS, 17; HIGHWAY, 9; MARRIED WOMAN, 7; PROMISSORY NOTE, 2; SCHOOL FUND, 4.

1. *Adjoining Buildings.—Damages.*—Where the owner of a building extends his building over onto an adjoining lot, on which a house is already standing, such owner will not be heard to complain that his neighbor's house is too close, or in injurious proximity to his building. *Lotz v. Scott, 155*
2. Where both the parties to a transaction have equal knowledge, or means of knowledge of all the facts, there can be no valid estoppel. *Platter v. Board, etc., 360*

EVIDENCE.

See APPEAL BOND; ATTORNEY AND CLIENT; CRIMINAL LAW, 6, 13, 14, 22, 29, 30, 35 to 42, 44, 45, 47, 48; HABEAS CORPUS, 3; HIGHWAY, 6, 8; INTOXICATING LIQUOR, 5, 7; JUDGMENT, 2, 10; NEGLIGENCE, 2; NEW TRIAL, 5; PRACTICE, 5, 11, 13; PROMISSORY NOTE, 6; SUPREME COURT, 1 to 3, 10, 12 to 15, 17, 19.

1. *Expert.—Hypothetical Case.*—Where a hypothetical case, covering the leading facts testified to, and practically admitted, is stated to a witness shown to be an expert, his opinion, based on such hypothetical case, is proper evidence. *Lotz v. Scott, 155*
2. *Damages.—Adjoining Owners.*—In an action for damage to the wall of a building, caused by the drippings from the eaves of an adjoining house, evidence that the bad condition from dampness, if such was their condition, of other brick walls in the immediate vicinity, against which there were no drippings from the eaves of adjoining houses, is admissible. *Ib.*
3. *Declarations of Partner.—When Admissible.*—To make the declarations of one partner admissible against the firm, they must have been made in the course of the partnership business and with respect to a transaction pertaining thereto. *Boor v. Lowrey, 463*
4. *Same.—When not Admissible.—Res Gestæ.*—The admissions and declarations of one partner, made after the event to which they relate has transpired, are not admissible against the other unless part of the *res gestæ*. *Ib.*
5. *Same.—When Opinion of Physician as to Treatment of Case not Binding on Partner.*—Opinions expressed by one physician, in the absence of his partner, after the employment is at an end, as to the propriety of the treatment or the results attained, are not binding on the latter. *Ib.*
6. *Same.—Expert.—Hypothetical Question.—Province of Jury.*—In an action

... against a surgeon for malpractice, a hypothetical question which asks a witness to assume that statements made by the defendant as to the cause of certain depressions and enlargements about a dislocated joint, with all the other facts supposed, are true, and upon the whole question give his opinion as an expert whether a reduction of the joint was accomplished, is within the rule. *Id.*

EXECUTION.

See MORTGAGE, 3; REPLEVIN, 3, 4.

EXECUTORS AND ADMINISTRATORS.

See ACTION, 3; DAMAGES, 1, 7; DECEDENTS' ESTATES; PARENT AND CHILD, 2; PARTITION, 1; PRACTICE, 17; TAXES, 1.

EXEMPTION.

See REPLEVIN, 3.

EXHIBITS.

See DRAINAGE, 8; PLEADING, 2, 5.

EXPERT.

See CRIMINAL LAW, 42; EVIDENCE, 1, 6.

FALSE IMPRISONMENT.

See TOWN, 2.

FALSE PRETENCES.

See CRIMINAL LAW, 26 to 28, 44, 45.

FENCE.

See RAILROAD, 7.

FINES AND PENALTIES.

See OFFICE AND OFFICER, 2; RECOGNIZANCE; TELEGRAPH COMPANY.

FIXTURES.

See LANDLORD AND TENANT.

FORBEARANCE TO SUE.

See PROMISSORY NOTE, 2.

FORECLOSURE.

See EASEMENT, 2; MARRIED WOMAN, 6; MECHANIC'S LIEN; MORTGAGE; REAL ESTATE, 6; VENDOR AND PURCHASER, 2.

FORFEITURE.

See RECOGNIZANCE.

FORMER ADJUDICATION.

See CITY, 7; JUDGMENT, 2.

Different Causes of Action.—There can be no former adjudication where the causes of action are different. *Board, etc., v. State, ex rel., 497*

FRAUD.

See COMMON CARRIER, 1; PROMISSORY NOTE, 12, 13.

GARNISHMENT.

See ATTACHMENT, 3.

GRAVEL ROAD.

1. *Delay in Acting upon Petition.*—Mere delay of the board of commissioners in taking action upon a petition for the establishment of a free

gravel road does not render proceedings afterwards had thereunder void. *Hobbs v. Board, etc., 575*

2. *Same.—Viewers Must Meet at Time Designated.—Notice.—Jurisdiction.*—Where the viewers appointed under a petition for a free gravel road do not meet at the time designated in the order appointing them, and in the notice given pursuant thereto, they can exercise no jurisdiction, and their acts are void. *Ib.*
3. *Same.—Taxes.—Injunction.*—Injunction will lie to restrain the collection of taxes where the proceedings of the board of commissioners are void. *Ib.*

GUARDIAN AND WARD.

Action for Waste Must be Brought by Ward and not by Guardian.—Under section 287, R. S. 1881, which provides that "A person seized of an estate in remainder or reversion may maintain an action for waste or trespass, for injury to the inheritance, notwithstanding an intervening estate for life or years," a guardian can not maintain such action for his ward, but it must be brought by the ward in his own name, by next friend, as provided by sections 255 and 256, R. S. 1881. *Wilson v. Galey, 257*

HABEAS CORPUS.

1. *Erroneous Judgment.—Criminal Law.*—A judgment of conviction by the circuit court, upon a plea of guilty, of murder in the first degree, and the fixing of punishment, without the intervention of a jury, are erroneous, but not void, and can not be attacked collaterally on *habeas corpus*. Section 1119, R. S. 1881. *Lowery v. Howard, 440*
2. *Custody of Infant.—Interest of Child Paramount Consideration.*—In a *habeas corpus* proceeding by a father to obtain the custody of his infant child from its maternal grandparents, the welfare of such child is the paramount consideration, and the order of the court must be made accordingly. *Jones v. Darnall, 569*
3. *Same.—Supreme Court.—Weight of Evidence.—Exception to Rule.*—When a *habeas corpus* case is before the Supreme Court on the evidence, the sufficiency of such evidence to sustain the finding will be passed upon. *Ib.*

HANDWRITING.

See CRIMINAL LAW, 35 to 39, 42.

HARMLESS ERROR.

See INTOXICATING LIQUOR, 2; PRACTICE, 7, 11, 14; SUPREME COURT, 15, 18.

HIGHWAY.

See DEDICATION, 3; GRAVEL ROAD.

1. *Petition to Enter of Record.—Notice.—Practice.—County Commissioners.*—A question as to notice of the pendency of a petition to have a highway described, and entered of record, must be made at the first opportunity before the board of commissioners. *Washington Ice Co. v. Lay, 48*
2. *Same.—Appearance.—Waiver of Defect in Notice.*—An appearance before the board of commissioners, without objecting to the notice, is a waiver of any defect therein, and objection can not afterwards be made on appeal. *Ib.*
3. *Same.—Petition.—Jurisdictional Fact.*—The highway law does not require that the qualifications of the petitioners for the recording of a highway shall appear upon the face of the petition. Whether or not it is signed by qualified persons, is a question for the decision of the county board before taking further action upon it. *Ib.*
4. *Same.—Objection to Qualification of Petitioners.—Waiver.*—Objections to the qualifications of the petitioners should be made at the first oppor-

- tunity before the county board, and if not so made they will be deemed as waived. *Ib.*
5. *Same.—Appearance to Defective Petition.—Practice.*—The judgment will not be reversed because the petition does not give the names of the persons over whose land the highway passes, when it appears that all such persons, without objecting, voluntarily appeared to such petition. *Ib.*
 6. *Same.—Evidence.*—The petition is a paper, in the case, and need not be introduced in evidence. *Ib.*
 7. *Same.—Order Entering of Record.*—In ordering the highway entered of record, the county board and the circuit court, on appeal, are confined to the road as described in the petition. *Ib.*
 8. *Same.—Immaterial Variance.*—An immaterial variance between the petition and the evidence, as to the beginning of the highway, will not overthrow the proceeding. *Ib.*
 9. *Same.—Estoppel.*—The refusal of the county commissioners to order a highway opened and established upon the line of an existing highway does not estop the board or others from having the existing highway entered of record. *Ib.*
 10. *Same.—User.—Public Utility.*—When a way has become a public highway by user, it is such regardless of any question of public utility. *Ib.*

HUSBAND AND WIFE.

See CONTRACT, 13; JUDICIAL SALE; MARRIED WOMAN.

IMPOUNDING ANIMALS.

See ANIMALS.

INDICTMENT.

See CRIMINAL LAW; INTOXICATING LIQUOR.

INFANT.

See CONTRACT, 7; DEED; GUARDIAN AND WARD; HABEAS CORPUS, 2; PARENT AND CHILD; PLEADING, 10, 11.

INJUNCTION.

See CITY, 10, 11; DRAINAGE, 9; GRAVEL ROAD, 3; RAILROAD, 14, 15.

1. *Will Lie to Prevent Cloud Being Cast Upon Title.*—The owner of real estate may, by injunction, prevent a cloud being cast upon his title. *Thomas v. Simmons, 538*
2. *Taxes.*—Injunction will lie to restrain the collection of taxes where the proceedings of the board of commissioners are void. *Hobbs v. Board, etc., 575*

INSTRUCTIONS TO JURY.

See BILL OF EXCEPTIONS; DAMAGES, 5; INTOXICATING LIQUOR, 2, 8; LIFE INSURANCE, 2; SUPREME COURT, 13, 15.

1. *When Error Cured.*—An erroneous instruction is not cured by the subsequent giving of a correct one unless the former be withdrawn; but where the court substitutes and reads to the jury another series of instructions for the series first read, in which substituted series the error is corrected, this fact is equivalent to a withdrawal of the first series. *McCrory v. Anderson, 13*
2. *Discretion of Court.—Practice.*—At the close of the evidence, and before argument, the granting of time to prepare special instructions to the jury is a matter in the sound discretion of the trial court, and un-

less the record affirmatively shows an abuse of such discretion, the Supreme Court will not review the ruling of the trial court.

Phillips v. Thorne, 275

INSURANCE.

See LIFE INSURANCE.

INTENT.

See CRIMINAL LAW, 30, 47.

INTOXICATING LIQUOR.

1. *Selling Without License.—Quantity.—“Drink.”*—Where, in a prosecution for selling intoxicating liquor without a license in a less quantity than a quart, the evidence shows that the quantity sold was a “drink,” and the amount paid for it was ten cents, the jury may find that the quantity sold was less than a quart. *Hamilton v. State, 96*
2. *Same.—Instruction.—Harmless Error.*—In such case, an instruction that to a fine the jury might add imprisonment for not less than *twenty* days, instead of *thirty* days, as provided by statute, is not an available error, imprisonment not being added as a part of the punishment. *Ib.*
3. *Selling to Intoxicated Person.—Indictment.—Quantity.*—Under section 2092, R. S. 1881, an indictment charging a sale of intoxicating liquor to a person who is in a state of intoxication is not bad because it fails to specify the quantity of liquor so sold. *Brow v. State, 133*
4. *Same.—Excuse for Sale is Matter of Defence.*—If a sufficient excuse existed for making such sale, it is a matter of defence. *Ib.*
5. *Same.—Knowledge of Intoxication.—Evidence.—Presumption.—Practice.*—In such case, when the State proves the sale, and that the purchaser was at the time in a state of intoxication, the case is *prima facie* made out, without showing that the defendant knew the purchaser was intoxicated, as the law will presume that he did know it. *Ib.*
6. *Same.—Notice.*—Persons entrusted with the sale of intoxicating liquor must take notice of the condition of those who apply for it. *Ib.*
7. *Same.—Evidence.*—For the purpose of fixing the time of the sale and to show the condition of the prosecuting witness, it is not error to allow him to testify that he lost his money on the occasion of the sale. *Ib.*
8. *Same.—Misconduct of Counsel in Argument.*—Where, in a prosecution for selling intoxicating liquor to a person in a state of intoxication, the prosecuting attorney, in addressing the jury, states, among other remarks of doubtful propriety, that “he knew personally the saloon-keeper in this case, and that he was guilty of this, and he was sure of other crimes,” it is error for the court, upon request, to fail to instruct the jury to disregard such improper remarks. *Ib.*

JEOPARDY.

See OFFICE AND OFFICER, 1.

JUDGMENT.

See CONTRACT, 13; CRIMINAL LAW, 21, 49; DAMAGES, 2; HABEAS CORPUS, 1, 2; JUDICIAL SALE; MANDATE, 1; MORTGAGE, 3; PARTITION, 1; PRACTICE, 17; SUBROGATION; VENDOR AND PURCHASER, 2.

1. *Non-Resident.—Notice by Publication.—Defective Affidavit.—Review.—Appeal.*—Where a judgment has been rendered upon notice by publication, founded on an insufficient affidavit, the remedy of a party to such judgment is by a complaint for review or by appeal. *Currico v. Tarwater, 86*
2. *Same.—Former Adjudication.—Evidence.*—In a subsequent suit covering the same subject-matter, and between the same parties, the record of

- such judgment is competent evidence for the purpose of showing a former adjudication of the matter in controversy. *Ib.*
3. *Collateral Attack.—Appeal.—Review.*—A judgment which is erroneous, but not void, is good as against a collateral attack. The remedy is by appeal or complaint for review. *State, ex rel., v. Morris, 161*
 4. *Review.—False Representations.—Excuse for Non-Appearance to Action.*—In an action to review a judgment, it is not a reasonable excuse for not appearing to and defending the original action, that the plaintiff therein and his attorney assured the defendants therein, the present plaintiffs, that such action was only to recover the possession of the lands in suit, on which assurance they relied, where the original complaint averred that the plaintiff was the owner in fee and entitled to the possession of such lands; and the fact that the plaintiff therein, without actual notice to the defendants, filed a second paragraph of complaint, charging that certain deeds, under which defendants claimed title to said lands, were void, will not be ground for review. *Rosa v. Prather, 191*
 5. *Same.—Statute of Limitation.*—The statutory method provided for obtaining the review of a judgment is, by the terms of its creation, a special proceeding, to which the various statutes of limitation affecting other actions and proceedings have no application. *Ib.*
 6. *Same.—Non-Residents.*—No reservation in favor of non-residents is contained in sections 615 and 616, R. S. 1881, limiting the time for review of a judgment. *Ib.*
 7. *Review.—Amended Supersedes Original Complaint.*—It is not necessary, in a complaint to review the proceedings and judgment in an action, to set out the original where an amended complaint was filed therein. *Funk v. Davis, 281*
 8. *Same.—Record.—Practice.*—No more of the record of the case to be reviewed is required to accompany the complaint or bill for review than is necessary to present the question upon which error is predicated. *Ib.*
 9. *Same.—Demurrer.*—A complaint properly assigning one good cause for review will not be bad because others are not well assigned. *Ib.*
 10. *Same.—Will.—Mistake in Description of Land Devised.—Evidence.*—An alleged mistake in the description of land devised can not be corrected by the admission of extrinsic evidence, unless the language of the will itself furnishes the basis of the correction; and where, in violation of this rule, a judgment is rendered so correcting a description in a will, a complaint to review will lie. *Ib.*
 11. *Same.—Demurrer.*—Where a complaint to review a judgment does not show on its face that it was not filed within a year from its rendition, such defect can not be reached by demurrer. *Ib.*
 12. *Rights of Assignee.*—The assignee of a judgment takes merely the rights held by his assignor. *Folts v. Wert, 404*
 13. *Same.—Lien of, Subject to Prior Equities.*—The general lien of a judgment creditor upon the lands of his debtor is subject to all equities existing against such lands, in favor of third persons, at the time of the recovery of the judgment. *Ib.*
 14. *Same.—Will be Restricted to Actual Interest of Judgment Debtor.*—Courts of chancery will restrict the lien of a judgment to the actual interest of the judgment debtor, so as to protect the rights of those having prior equities in the property or its proceeds. *Ib.*
 15. *Complaint to Impeach for Want of Notice of Pendency of Action.—Collateral Attack.*—Where a party, by complaint in another suit, seeks to impeach the judgment of a court of superior jurisdiction upon the

ground that he had no legal notice of the pendency of the suit in which such judgment was rendered, he must allege what, if anything, is shown by the record in relation to notice to him.

Baltimore, etc., R. R. Co. v. North, 486

JUDICIAL SALE.

See MORTGAGE, 1, 3.

Inchoate Interest of Wife.—Remainder.—Under sections 2483 and 2508, R. S. 1881, when a judicial sale is made of any land in which the husband has a heritable interest, the inchoate one-third of the wife, where the judgment does not bar her rights, vests and becomes absolute in her. A remainder in fee is such an interest. *Foltz v. Wert, 404*

JURISDICTION.

See DECEDENTS' ESTATES, 3; GRAVEL ROAD, 2; HIGHWAY, 3, 5; PARTNERSHIP, 2.

1. *Jurisdiction of Mayor.*—Within the city limits, a mayor has the jurisdiction and powers of a justice of the peace; but, as a general rule, an action may be brought before him upon a contract made or for a tort committed without the city, if the defendant lives in the city.
Wabash, etc., R. W. Co. v. Lash, 80
2. *Same.—Appearance.—Waiving Objection to Jurisdiction.*—By entering a full appearance, without objecting to the jurisdiction of the court, such objection is waived. *Ib.*

JURY.

See CRIMINAL LAW, 43; EVIDENCE, 6; HABEAS CORPUS, 1; INSTRUCTIONS TO JURY; PARTNERSHIP, 2; PRACTICE, 9, 10; SET-OFF.

Act of April 15, 1881, Concerning.—Construction of.—The act of April 15th, 1881, concerning juries, only fully repealed previous statutes on the same subject, when, from the lapse of time, or other kindred causes, all of its provisions became inconsistent with its declared object and purposes; and a jury drawn under the former law continued in existence until superseded by one drawn under the new law, unless its term of service had previously expired. *McCrary v. Anderson, 12*

JUSTICE OF THE PEACE.

See APPEAL BOND; JURISDICTION, 1.

LANDLORD AND TENANT.

1. *Right of Tenant to Remove Buildings Erected by Him.*—A tenant who, for the better enjoyment of the premises, erects buildings thereon, may remove them at any time before his tenancy ceases, if the removal can be accomplished without permanent injury to the freehold.
Hedderich v. Smith, 203
2. *Same.—Failure to Remove During Tenancy.*—Where a tenant, while rightfully in possession, neglects to remove buildings erected by him, he is presumed to have abandoned them, unless his right to remove them afterwards is reserved by agreement with the landlord. *Ib.*
3. *Same.—Accepting New Lease Without Reserving Fixtures.—Waiver.*—Although a tenant continues in possession after the expiration of his original term, yet, if he holds under a new lease, in which no provision for the removal of the fixtures is made, he is treated as having abandoned his right thereto. *Ib.*

LEASE.

See CONTRACT, 2 to 6, 8; LANDLORD AND TENANT; TRUST AND TRUSTEE.

LEGISLATURE.

See DRAINAGE, 10 to 12; OFFICE AND OFFICER, 2.

LICENSE.

See INTOXICATING LIQUOR, 1.

LIEN.

See JUDGMENT; MECHANIC'S LIEN; MORTGAGE; PARTITION, 1; REAL ESTATE, 1 to 3; SUBROGATION; VENDOR AND PURCHASER.

LIFE INSURANCE.

1. *Mutual Aid Association.—Action on Certificate of Membership.—Complaint.—Matter of Defence.*—In an action upon a certificate of membership issued by a mutual insurance company holding no reserve fund, entitling the beneficiary to "one thousand dollars, or so much thereof as may be realized from one assessment," it is not necessary to aver in the complaint the number of the members of the association against whom assessments might be made, and unless it be shown in defence that one assessment would not produce the full amount of the certificate, the plaintiff is entitled to recover the maximum insured. *Elkhart, etc., Ass'n v. Houghton, 236*
2. *Same.—Insurable Interest.—Grandfather and Grandson.—Instruction.*—An instruction, that "a grandson, with whom a grandfather resides, has an insurable interest in the life of the grandfather, and a policy of insurance taken out by the grandfather in favor of the grandson, in the absence of fraud, is valid and binding on the company issuing it," considered as a whole, is not an erroneous statement of law. *Id.*

LIMITATION OF ACTIONS.

See STATUTE OF LIMITATIONS.

LOTTERY.

See CRIMINAL LAW, 16.

MALICIOUS PROSECUTION.

Probable Cause.—Proceeding at Law.—To constitute a proceeding at law a malicious prosecution, it must not only be prosecuted maliciously, but without probable cause. *Uppinghouse v. Mundel, 238*

MALICIOUS TRESPASS.

See CRIMINAL LAW, 29, 30.

MALPRACTICE.

See ACTION, 3; DAMAGES, 7; EVIDENCE, 3 to 6; PARTNERSHIP, 3.

MANDATE.

See OFFICE AND OFFICER, 6, 9.

1. *Return.—County Auditor.—Allowance.*—To an alternative writ of mandate directed to a county auditor, requiring him to show cause why he should not draw a warrant on the county treasury for the amount of an allowance made by the circuit court, it is a good return that the order of such court directed that such allowance should be paid by another person out of another fund, and that the claim had never been presented to and allowed by the board of county commissioners. *State, ex rel., v. Morris, 161*
2. *Same.—Return Need not be Verified.—Pleading.—Practice.*—The return to a writ of mandate need not be verified, as, under section 1171, R. S. 1881, issues of law and fact may be joined and trial had as in civil actions. *Id.*

MARRIED WOMAN.

See CONTRACT, 13; JUDICIAL SALE.

1. *Mortgage upon her Separate Real Estate to Secure Husband's Debt.*—*Contract of Suretyship.*—Under section 5119, R. S. 1881, a mortgage executed by a married woman upon her separate real estate to secure her husband's debt, is void. *Brown v. Will, 71*
2. *"Legal Disabilities."*—*Coverture.*—Married women are not persons "under legal disabilities" within the meaning of the statute, section 615, R. S. 1881; nor is coverture any longer a legal disability in this State except in special cases. *Rosa v. Prather, 191*
3. *Mortgage of Separate Land to Secure Husband's Debt.*—*Contract of Suretyship.*—Under section 5119, R. S. 1881, a mortgage executed by a wife upon her separate land to secure her husband's debt, is a contract of suretyship, and void. *Cupp v. Campbell, 213*
4. *Same.*—*Mortgage to Pay Prior Encumbrance.*—Where a part of the money secured by the mortgage is applied to the payment of a valid prior encumbrance on the wife's land, to that extent she is principal and the mortgage binding. *Aliter*, if the prior encumbrance is void, *e. g.*, where the land was acquired by the wife by devise and was mortgaged to secure her husband's debt while the act of 1879, making void an encumbrance of land so acquired, for such purpose, was in force. *Id.*
5. *Same.*—*Inchoate Interest.*—Where a wife joins in a mortgage of her husband's real estate, it is not, as to her inchoate interest, a contract of suretyship within the meaning of section 5119, R. S. 1881. *Id.*
6. *Same.*—*Foreclosure.*—*Burden of Issue.*—Where it is sought to foreclose a mortgage or enforce a contract against the separate property of a married woman, the plaintiff must aver and prove that the mortgage or other contract was one which she had the power to make. As to the mortgage, it is *prima facie* a sufficient answer for the wife to aver her coverture, and that the real estate is her separate property, and that the debt is her husband's. *Id.*
7. *Same.*—*Estoppel.*—A married woman may be bound by an estoppel *in pais*, but in the absence of fraud, misrepresentation or concealment, she is not estopped by the mere form of a contract which she had no power to make. *Id.*
8. *Same.*—*Duty of Mortgagee to Inquire as to Consideration.*—One contracting an encumbrance on the property of a married woman is bound to inquire concerning the consideration, whether it is for her benefit or for the benefit of another, and unless misled by her conduct or misrepresentations he will be held to have acquired a knowledge of the facts which prudent inquiry would have disclosed. *Id.*
9. *Same.*—*Protection of Inchoate Interest.*—*Semble*, that the protection of her inchoate interest in her husband's land is such a benefit as will uphold a mortgage on her separate estate to raise money for that purpose; but it must appear that she contracted with that object in view, or that the benefit actually resulted. *Id.*
10. *Liability for Tort.*—A married woman, for a tort committed by the violation of any duty imposed upon her by law with respect to her separate property, is liable to the same extent as if she were unmarried. *Mayhew v. Burns, 328*
11. *Contract.*—*Coverture.*—Where, to an action on contract against a married woman, she pleads coverture, the plaintiff must reply the facts which show that the contract declared on is one which she had power to execute. *Arnold v. Engleman, 512*
12. *Same.*—*Executory Contract.*—*Statute Construed.*—Under section 5115, R.

S. 1881, a married woman has general power to make executory contracts except in certain specified cases; and the provision of section 5117, that she may make contracts concerning her separate personal property, is not a limitation upon such general power. *Ib.*

13. *Same.—Wearing Apparel.—Promissory Notes.*—A married woman may purchase wearing apparel for herself, and notes, executed by her for the price which she agreed to pay therefor, are valid, and may be enforced. *Ib.*

MASTER AND SERVANT.

See RAILROAD, 10 to 12.

MAYHEM.

See CRIMINAL LAW, 46.

MAYOR.

See JURISDICTION; PRACTICE, 4; RAILROAD, 7.

MEASURE OF DAMAGES.

COMMON CARRIER, 2 to 4; DAMAGES.

MECHANIC'S LIEN.

1. *Religious Society.—Contract.—Foreclosure.—Complaint.*—A complaint against the trustees of a religious society to foreclose a mechanic's lien for work and labor done and materials furnished, which charges that the services performed by the plaintiff were rendered under the order and at the request of the society assembled as a congregation, with the knowledge and implied consent of the defendants, is sufficient to create an obligation upon the society as an organization, and, therefore, sufficient against its trustees.

Gortemiller v. Rosengarn, 414

2. *Same.—Knowledge of Contractor that Society Relies on Voluntary Contributions to Pay for Improvement.*—A majority of the members of a religious society, including its trustees, believing that the necessary funds could be raised by voluntary contributions, voted to have improvements made to its church building, and appointed a committee to make a contract for and superintend the work; G., with knowledge that voluntary contributions were relied on to pay for the same, undertook to do the work for a certain sum, relying upon obtaining his pay through the agency of the society. No other arrangement was made for paying G. for his services.

Held, that G., having performed the work, became entitled to enforce a lien upon the building. *Ib.*

MERGER.

See MORTGAGE, 3; VENDOR AND PURCHASER, 2.

MISNOMER.

See ABATEMENT.

MISTAKE.

See ABATEMENT; JUDGMENT, 10.

MORTGAGE.

See EASEMENT, 2; MARRIED WOMAN, 1, 3 to 9; REAL ESTATE, 1 to 3, 6; SUBROGATION; VENDOR AND PURCHASER.

1. *Contract.—Equitable Mortgage.—Foreclosure.—Payment when Time not Fixed by Contract.*—An instrument designated "memoranda of contract," signed by S. B. and wife and E. B., provided that S. B. had previously obtained \$3,000 from E. B., with which he purchased certain described land, "the use and control of which we do hereby turn over to the said" E. B. "until sold, and when sold the \$3,000 above named,

and one-half of the advance over, together with the \$3,000 that may be obtained on the sale of said land, we will pay to" E. B. It was stipulated that S. B. should put \$200 worth of improvements on the land, and that E. B. should pay the taxes and keep the farm in as good repair as when received; that in case E. B. should die "before the sale of the farm and the cancelling of this paper," then the \$3,000 should be a gift to S. B., and the paper should be void. S. B. died without making the improvements or selling the land. Action by E. B. on the contract, with a prayer that the land be ordered sold and his claim paid out of the proceeds.

Held, that the instrument set out is an equitable mortgage, and that E. B. is entitled to have the land sold to pay the debt evidenced by it.

Held, also, that as no time was fixed for the payment of the money, the law made it the obligation of S. B. to pay it within a reasonable time.

Brown v. Brown, 23

2. *Description*.—The office of a description is to furnish means of identification, and a mortgage which does this is in that respect sufficient.

Thomson v. Madison, etc., Ass'n, 279

3. *Merger*.—*Assignment of Decree*.—*Execution Over for Balance After Sale*.—

Where a junior mortgagee, after obtaining a decree of foreclosure and a personal judgment with right to execution over for any balance after sale, receives a sheriff's deed as assignee of the certificate of sale under a senior mortgage, and then conveys the land by warranty deed to a third person, his decree, in the absence of any intervening equities, merges in the title so derived; and, there having been no sale thereunder, and hence no ascertained balance, execution could not, under section 634 of the code of 1852, be had against other property of the mortgagor, either in favor of himself or one who took it by assignment after the merger became complete. *Thomas v. Simmons*, 538

MUNICIPAL CORPORATION.

See CITY; COUNTY COMMISSIONERS; TOWN; TRUST AND TRUSTEE, 3.

MURDER.

See CRIMINAL LAW, 18 to 22, 43; HABEAS CORPUS, 1.

MUTUAL AID ASSOCIATION.

See LIFE INSURANCE.

NEGLIGENCE.

See CITY, 1 to 9; COMMON CARRIER, 1; COUNTY COMMISSIONERS, 4 to 6; DAMAGES, 1, 2, 7; EVIDENCE, 2, 6; RAILROAD, 1 to 6, 10 to 12; REAL ESTATE, 1; TELEGRAPH COMPANY, 8, 11 to 13.

1. *Excavation Causing Pitfall upon Adjoining Lot*.—*Parent and Child*.—One who makes an excavation upon his lot in such a manner as to cause a pitfall upon an adjoining lot is liable, in the absence of contributory negligence, to one who resides upon the latter, for the death of his child caused by falling into such pit. *Mayhew v. Burns*, 328

2. *Same*.—*Evidence*.—*Care of Children*.—*Pecuniary Condition of Father*.—*Contributory Negligence*.—Where one is suing for the death of his child alleged to have been caused by the negligence of another, evidence that the plaintiff is poor, and not able to employ any one other than his housekeeper to take care of his children, is not admissible upon the question of contributory negligence. *Ib.*

3. *Same*.—*Knowledge of Danger*.—*Duty to Avert*.—Where one knows of danger which threatens injury to himself or those to whom he is bound to afford protection, and he can by reasonable exertion avert it, his negligent failure to do so will prevent a recovery. *Ib.*

NEW TRIAL.

See CONTINUANCE, 2; CRIMINAL LAW, 21, 22; PRACTICE, 8; SUPREME COURT.

1. *Motion for, After Term.*—A motion for a new trial made after the term can not be considered where it appears that there was no agreement or order of court extending the time for filing the motion, and that the finding was not made on the last day of the term.
City of Evansville v. Martin, 206
2. *Application for, as of Right.—Pending Appeal.*—The fact that an appeal has been taken, and is pending undisposed of in the Supreme Court, will not, in an action for the recovery of real estate, prevent the appealing party from taking a new trial as a matter of right, as provided by section 1064, R. S. 1881.
Indiana, etc., R. W. Co. v. McBroom, 310
3. *Same.—Supreme Court.—Dismissal of Appeal.*—Where the judgment has been vacated by the granting of a new trial as a matter of right, upon certification of such action to the Supreme Court, the appeal will be stricken from the docket.
Ib.
4. *Same.—Statute Granting New Trial as of Right Mandatory.*—When the application for a new trial as of right is made within one year as provided by statute, the trial court has no discretion—it must vacate the judgment and grant such new trial.
Ib.
5. *Impeaching and Cumulative Evidence.*—As a general rule, a new trial will not be granted simply to let in newly discovered impeaching evidence; nor will the discovery of merely cumulative evidence be sufficient ground for a new trial.
Marshall v. Mathers, 458

NON-RESIDENT.

See JUDGMENT, 1, 2, 6.

NOTICE.

See CITY, 1, 3; COUNTY COMMISSIONERS, 14, 15; DRAINAGE, 5, 7, 9, 14 to 16; GRAVEL ROAD, 2; HIGHWAY, 1, 2; INTOXICATING LIQUOR, 6; JUDGMENT, 1, 4, 6, 15; MARRIED WOMAN, 8; MECHANIC'S LIEN, 1; NEGLIGENCE, 3; OFFICE AND OFFICER, 7; PROMISSORY NOTE, 2, 11, 12, 14; VENDOR AND PURCHASER, 2.

NUISANCE.

See CITY, 9; TRESPASS.

OBSCENE LITERATURE.

See CRIMINAL LAW, 32 to 42.

OFFICE AND OFFICER.

See ATTACHMENT, 5; CITY, 11; COUNTY COMMISSIONERS; SCHOOL FUND, 2, 4; STATUTE OF LIMITATIONS, 1; TAXES, 1 to 3; TOWN.

1. *County Clerk.—Action on Bond to Recover Illegal Fees.—Constitutional Law.—Twice in Jeopardy.*—That part of section 6031, R. S. 1881, which provides that "Any officer who shall charge, demand, or take" any unauthorized fee for the performance of any official act, shall, in addition to being deemed guilty of a misdemeanor, "be liable on his official bond to the party injured for five times the illegal fees charged, demanded, or taken," is not unconstitutional, as being within the prohibition of that part of the Bill of Rights which declares that "No person shall be put in jeopardy twice for the same offence."
State, ex rel., v. Stevens, 55
2. *Same.—Criminal and Civil Liability for Same Act.—Exemplary Damages.—Legislative Power.*—The Legislature has the power to prescribe fines and penalties against certain acts, and at the same time fix or

- limit the civil liability for the same acts, but not to authorize the recovery of unrestricted exemplary damages. *Ib.*
3. *Same.—Liability on Bond for Failure to Discharge Duty Required by Subsequent Law.*—Under section 5528, R. S. 1881, a permanent, continuing liability is created against an officer and his sureties for the failure to discharge any duty imposed by existing law, and for the failure to discharge any duty required under laws subsequently enacted. *Ib.*
 4. *Same.—Motion to Re-Tax Costs.—Collateral Attack.*—The failure of a party to move to re-tax costs can not relieve an officer from his statutory liability if he has in fact charged illegal fees; nor is an action on his bond for such fees a collateral attack on the judgment for costs, of which such officer can take advantage. *Ib.*
 5. *Same.—Statute of Limitations.*—Under the second clause of section 293, R. S. 1881, an action on the bond of a county clerk to recover fees charged illegally may be brought within five years from the time the cause of action accrued. *Ib.*
 6. *Mandate to Compel Predecessor to Surrender Records.—Eligibility.—Pleading.*—Mandamus is the proper remedy to compel a retiring officer to turn over to his successor the records and furniture pertaining to the office, and it is not necessary to allege in the application that such successor is eligible to the office, as is the case in *quo warranto* to try title. *McGee v. State, ex rel., 444*
 7. *Same.—Resignation.—Acceptance.—Title to Office.*—Where, without notice of the withdrawal of a resignation previously made, the time arrives for it to take effect, and a successor to the incumbent is duly appointed, no formal acceptance of such resignation is necessary to deprive such incumbent of title to the office. *Ib.*
 8. *Same.—Regularity of Appointment.—Refusal to Surrender Records.*—One can not contest the regularity of the appointment of a successor, who has become invested with an apparent title, by refusing to surrender the records of the office. *Ib.*
 9. *Same.—County Superintendent.—Appointment of.*—Without regard to whether the votes of a majority of all the school trustees are necessary to the valid appointment of a county superintendent of schools, where such trustees recognize the appointment as valid, and the appointee qualifies and enters upon the duties of the office with the acquiescence of all others, the latter may compel his predecessor by mandamus to deliver to him the records of the office. *Ib.*

OPINION.

See EVIDENCE, 1, 5, 6.

PARENT AND CHILD.

See DEED; HABEAS CORPUS, 2; NEGLIGENCE.

1. *When Father May Maintain Action in His Own Right for Death of Child.—Cases Modified and Approved.*—Under section 266, R. S. 1881, a father, during the continuance of the relation of parent and child, may maintain an action in his own right for damages caused by the death of his child. *Gann v. Worman*, 69 Ind. 458, modified, and *Pennsylvania Co. v. Lilly*, 73 Ind. 252, approved. *Mayhew v. Burns, 328*
2. *Same.—When Action Must be Brought by Personal Representative.*—Where the relation of parent and child does not exist, the action, under section 284, R. S. 1881, must be brought by the personal representative, regardless of the age of the person whose death has been caused. *Ib.*

PARTIES.

See PARTITION, 2; PLEADING, 8; PROMISSORY NOTE, 10.

PARTITION.

1. *Will. — Advancements. — Contract. — Lien. — Trust. — Statute of Frauds. — Review of Judgment.*—A testator devised all of his real and personal property to his wife for life, and at her death what remained was to be divided equally between his children. While acting as executrix of the will, the widow, in consideration of an oral agreement between herself and such children, that the amount received by each should be charged against his share in the final partition of the real estate, surrendered the personal estate to the children, each receiving a portion differing in amount from that received by the others. This distribution was reported to and approved by the court. After the death of the widow there was partition accordingly. On a complaint by the assignee of a judgment against one of the sons, for a review of the judgment in the partition proceeding,
Held, that it was competent for the mother and children to agree to the distribution so made.
Held, also, that, under the agreement, the sum received by each child will be regarded in equity as an advancement.
Held, also, that the agreement was not the creation of a lien upon or the declaration of a trust in the real estate.
Held, also, that the rights of the others in the common estate could not be impaired by liens acquired on the interest of one without their consent, nor could they be deprived of any right incident to partition.
Held, also, that the agreement having been so far executed as that the personal property was distributed under it, it is too late for the plaintiff to interpose the statute of frauds, even if the agreement were within its terms. *Folta v. Wert, 404*
2. *Sale by Commissioner. — Rights of Surety. — Parties. — Re-Sale.*—One who is surety for the payment of purchase-money, upon a sale of real estate by a commissioner in partition, becomes a party to the proceeding, as also does the purchaser, and, upon the failure of the latter to pay, the surety may petition for, and the court in the exercise of its chancery powers may grant, a re-sale of the property. *Rout v. King, 555*

PARTNERSHIP.

See CRIMINAL LAW, 26, 27; EVIDENCE, 3 to 5.

1. *Agreement to Pay for Services of Partner. — Pleading.*—A partner can not recover for services rendered a firm of which he is a member, unless there is an agreement that he shall recover therefor; and a pleading, alleging that the services were rendered at the special instance and request of the members of the firm, is bad on demurrer. *McBride v. Stradley, 465*
2. *Same. — Equity. — Accounting.*—Under the code of 1881, a suit between partners for an accounting is one of equitable jurisdiction, and not triable as of right by a jury. *Ib.*
3. *Abatement of Action Against One Partner. — Quære*, whether, upon the death of one of two partners sued jointly for malpractice and the consequent abatement of the action as to him, the action also abates as to the other? In any event, however, a plea is necessary. *Boor v. Lowrey, 468*

PAYMENT.

See CONTRACT, 12; MORTGAGE, 1.

PERJURY.

See CRIMINAL LAW, 23 to 25.

PERPETUITIES.

See TRUST AND TRUSTEE, 2.

PERSONAL PROPERTY.

See REPLEVIN; TAXES, 4, 5.

PLEADING.

- See ABATEMENT; ATTACHMENT; CITY, 1, 2, 8; COMMON CARRIER, 5; CONTRACT, 1; COSTS; CRIMINAL LAW; DAMAGES, 1, 2; DRAINAGE; HIGHWAY, 3, 5, 6; JUDGMENT, 7 to 9, 11, 15; LIFE INSURANCE, 1; MANDATE; MARRIED WOMAN, 6, 11; MECHANIC'S LIEN, 1; OFFICE AND OFFICER, 6; PARTNERSHIP, 1, 3; PRACTICE; PROMISSORY NOTE, 1, 4, 8 to 10, 14; RAILROAD, 1, 6, 7, 9, 13, 14; REAL ESTATE, 6; REAL ESTATE, ACTION TO RECOVER; REPLEVIN, 1, 4; SPECIAL FINDING, 1; SUPREME COURT, 6 to 9; TAXES, 1; TELEGRAPH COMPANY, 2, 4 to 6.
1. *Specific Statements Control General Averments.*—Specific statements of facts in a pleading control general averments therein.
Ivens v. Cincinnati, etc., R. W. Co., 27
 2. *Exhibit.—Practice.*—An exhibit, attached to an answer, which is not the foundation of the defence, does not become part of it, and can not be looked to in determining its sufficiency.
Western Union Tel. Co. v. Ferris, 91
 3. *Demurrer.*—Where the facts pleaded entitle a plaintiff to some relief, the complaint will repel a demurrer.
Wolke v. Fleming, 105
 4. *Counter-Claim.*—When the facts averred in an answer present a counter-claim, the fact that it is not formally pleaded as such is not material.
Mills v. Rosenbaum, 152
 5. *Exhibit.—Practice.*—Where an instrument is set forth in a complaint, or made an exhibit thereto, it is sufficient to refer to it in the answer without again making it an exhibit.
Grubbs v. Morris, 166
 6. *Bad Reply Sufficient for Bad Answer.*—A bad reply is sufficient for a bad answer.
Cupp v. Campbell, 213
 7. *Demurrer for Fifth Cause Calls in Question Sufficiency of Facts and Right of Action in Plaintiff.*—A demurrer to a complaint for the fifth statutory cause (section 339, R. S. 1881,) calls in question not only the sufficiency of facts stated to constitute a cause of action, but also a cause or right of action which the plaintiff in his own name may sue upon and enforce.
Wilson v. Galey, 257
 8. *Defect of Parties to Answer.—Waiver.—Practice.*—A defect of parties to an answer which presents a set-off or other claim which might constitute an independent cause of action, must be taken by demurrer when apparent, or by plea when not apparent, or it will be deemed waived.
Talmage v. Bierhause, 270
 9. *Uncertainty.—Practice.*—The remedy for uncertainty in a pleading is by motion, and not by demurrer.
Thomson v. Madison, etc., Ass'n, 279
 10. *Minors.*—The fact that a complaint fails to aver that some of the plaintiffs are minors, suing by their next friend, will not make it bad on demurrer.
Funk v. Davis, 281
 11. *Same.—Caption of Complaint.—Averment as to Infancy.*—Naming plaintiffs in the caption of a complaint as minors suing by next friend is not a sufficient averment of minority.
Ib.
 12. *Construction of.*—Pleadings are to be judged by their general scope and tenor, and not by detached and isolated statements thrown into them.
City of North Vernon v. Voegler, 314
 13. *Amendment.—Supreme Court.—Practice.*—The decision of the trial court granting or refusing leave to amend a pleading, where cause is shown, is not conclusive, and may be reviewed in the Supreme Court.
Chicago, etc., R. W. Co. v. Jones, 386

14. *Evidence*.—The sufficiency of a complaint must be determined by the facts pleaded, and the court can not look to the evidence to ascertain whether any injury resulted from a ruling on demurrer.

Pennsylvania Co. v. Poor, 553

POLICE REGULATION.

See COUNTY COMMISSIONERS, 1 to 3, 6.

PRACTICE.

See ABATEMENT; APPEAL BOND; ATTACHMENT; ATTORNEY AND CLIENT; BILL OF EXCEPTIONS; CITY, 1, 8; CONTINUANCE; COSTS; CRIMINAL LAW; DAMAGES, 2, 6; DECEDENTS' ESTATES; DRAINAGE; EVIDENCE, 1, 6; GRAVEL ROAD; GUARDIAN AND WARD; HABEAS CORPUS; HIGHWAY; INJUNCTION; INSTRUCTIONS TO JURY; INTOXICATING LIQUOR; JUDGMENT; JURISDICTION; MANDATE, 2; NEW TRIAL; OFFICE AND OFFICER, 4, 6; PLEADING; PROMISSORY NOTE, 8, 10, 12; RAILROAD, 6, 13 to 15; REPLEVIN, 1; SET-OFF; SPECIAL FINDING; SUPREME COURT; TAXES, 1; TELEGRAPH COMPANY, 4, 6, 13.

1. *Motion to Strike Out*.—*Bill of Exceptions*.—A motion to strike out a pleading must be made part of the record by bill of exceptions or order of court.
Lang v. Clapp, 17
2. *Arrest of Judgment*.—A motion in arrest of judgment, because of a fatally defective complaint, may be properly sustained, notwithstanding the fact that a demurrer to such complaint had been previously overruled.
Stewart v. Terre Haute, etc., R. R. Co., 44
3. *Motion to Dismiss Appeal from County Commissioners*.—*Bill of Exceptions*.—A motion in the circuit court to dismiss an appeal from the board of county commissioners must be made part of the record by bill of exceptions or order of court.
Washington Ice Co. v. Lay, 48
4. *Pleading and Practice Before Mayor*.—*Appeal*.—Where a cause is commenced before a mayor, the rules of pleading and practice before that tribunal must be observed in the circuit court on appeal, and a complaint sufficient before a mayor is sufficient in the circuit court.
Wabash, etc., R. W. Co. v. Lash, 80
5. *Objections to Admission of Evidence*.—*Bill of Exceptions*.—Objections to the admission of evidence must be specific, and the grounds upon which they are based set forth in the bill of exceptions.
Grubbs v. Morris, 166
6. *Sufficiency of Answer*.—*Supreme Court*.—The sufficiency of an answer must be primarily questioned in the trial court, and the overruling of a demurrer to the reply is not available for this purpose.
Cupp v. Campbell, 213
7. *Evidence*.—*Harmless Error*.—The subsequent offer by the trial court to admit excluded evidence, made while the parties and their witnesses were present in court and before argument, which offer was declined, will make the error, if any, in the exclusion of such evidence, a harmless one.
Phillips v. Thorne, 275
8. *Motion for New Trial*.—A party can not by statements in a motion for a new trial get evidence or objections thereto into the record.
Thomson v. Madison, etc., Ass'n, 279
9. *Finding by Jury in Equity Case*.—*Venire de Novo*.—In cases of equity jurisdiction, properly triable by the court, the finding of the jury will be treated as advisory unless it appears that the parties and the court treated the case as an action at law, and its form and contents are not material unless adopted by the court, and a motion for a *venire de novo* is not proper.
Platter v. Board, etc., 360

10. *Same.—Province of Court.*—Although a finding has been made by a jury in a case properly triable by the court, the ultimate decision of all questions of fact, as well as of law, must be made by the court, and where it renders judgment according to the merits of the case, there can be no reversal. *Ib.*
11. *Same.—Evidence.—Harmless Error.*—The admission of incompetent but harmless evidence is not available for the reversal of a judgment. *Ib.*
12. *Pleading.—Motion to Strike Out will not Perform Office of Demurrer.*—Where the matter alleged is pertinent, and the pleading is not a sham, it is error to sustain a motion to strike out an answer for the alleged want of facts to constitute a defence to the action. Such motion will not perform the office of a demurrer. *Burk v. Taylor, 399*
13. *Evidence.—Issues.*—Evidence, incidentally given, but not applicable to any issue formed on the pleadings, can not be taken into consideration in determining whether the finding was right upon the evidence. *Marshall v. Mathers, 458*
14. *Pleading.—Harmless Error.*—Where the general denial is pleaded, it is a harmless error to sustain a demurrer to an argumentative denial. *McBride v. Stradley, 465*
15. *Abatement.—Arrest of Judgment.*—Where the action has abated as to one of two persons sued jointly, no judgment can be properly pronounced on a verdict against both, over a motion in arrest. *Boor v. Lowrey, 468*
16. *Same.*—A judgment should be arrested where such error appears on the face of the record as vitiates the proceedings. *Ib.*
17. *Appeal.—Action Commenced by Party and Continued by Administrator.—Civil Code Governs, and not Decedents' Estates Act.*—Where an action is commenced by one in his lifetime, to annul and enjoin the collection of a judgment, and prosecuted to final hearing after his death by his administrator, substituted as plaintiff, the right of appeal, and the manner and time of taking it, are governed by the civil code of practice, and not by the statute regulating the settlement of decedents' estates. *Heller v. Clark, 591*

PRESUMPTION.

See ATTACHMENT, 5; COMMON CARRIER, 6; CONTRACT, 1, 7; CRIMINAL LAW, 9; DEED; INTOXICATING LIQUOR, 5; PRINCIPAL AND AGENT, 1; SUPREME COURT, 13, 22.

PRINCIPAL AND AGENT.

See ATTACHMENT, 5; COUNTY COMMISSIONERS, 5, 11.

1. *Agent's Authority to Warrant.—Presumption.*—An agent, upon whom general authority to sell is conferred, will be presumed to have authority to warrant unless the contrary appears. *Talmage v. Bierhaue, 270*
2. *Same.—Sale of Commodity not Present.*—It will be presumed, in the absence of a showing to the contrary, that a warranty is not an unusual incident to a sale by an agent for a dealer in a commodity, where the thing sold is not present and subject to the inspection of the purchaser. *Ib.*
3. *Same.—When Principal Liable Notwithstanding Instructions to Agent.*—Though the authority of the agent be restricted by instructions from his principal, the latter will be bound by a warranty attending a sale by the agent unless the purchaser knew of such restriction. *Ib.*

PRINCIPAL AND SURETY.

See CONTRACT, 13; MARRIED WOMAN, 1 to 9; OFFICE AND OFFICER, 3; PARTITION, 2; PROMISSORY NOTE, 14; RECOGNIZANCE.

PROMISSORY NOTE.

See COSTS; MARRIED WOMAN, 1 to 9, 11 to 13.

1. *Not Payable in Bank.—Action by Assignee.—Defence by Maker, of Breach of Warranty by Payee.—Answer.*—In an action by the assignee of a note not payable in bank against the maker, an answer that the consideration of the note was part of the purchase-price of real estate, conveyed to the maker by the payee, with full covenants of warranty; that to protect his title he had been compelled to buy in the real estate at a sheriff's sale made in satisfaction of a judgment against the payee, which was a lien on the property at the time of his purchase; that the amount so paid was greater than the balance due on the note, and that the payee was insolvent, is good. *Henry v. Gilliland, 177*
2. *Same.—Forbearance to Sue.—Estoppel.*—Where the holder of such promissory note gratuitously permits it to run more than a year after maturity, and then, upon the payment of a part of it by the maker, the holder, at the request of the maker, and without losing any right or changing his situation, agrees to wait until the latter can collect money with which to discharge the balance, such maker is not estopped to set up a defence then existing, or which might thereafter arise, of which neither such maker nor the holder had notice at the time of such agreement. *Ib.*
3. *Same.—Extension Must be for Definite Time and on Valid Consideration.—Performance.*—To defeat the right to a clear defence to a note, not payable in bank, in the hands of an assignee, on the ground of a subsequent contract to pay in consideration of an extension of time, the plaintiff must show a contract of extension for a definite time, upon a valid consideration. Performance of his part is not sufficient to bind the maker. *Ib.*
4. *Title.—Pleading.*—In a complaint against the maker of a promissory note, it is sufficient to show title in the plaintiff, and this may be done by alleging that it was sold and assigned to him. *Thomson v. Madison, etc., Ass'n, 279*
5. *Same.—Assignment of Note Carries Mortgage.*—Where the note secured by a mortgage is assigned, the assignment carries the mortgage. *Ib.*
6. *Same.—Assignment in Blank.—Evidence of Title.*—The assignment of a promissory note in blank is sufficient to prove title in the holder. *Ib.*
7. *Same.—Ultra Vires.—Defence.*—If a corporation had no power to purchase a note and mortgage upon which it brings suit, that fact should be pleaded as a defence. *Ib.*
8. *Action by Endorsee.—Complaint.—Copy of Endorsement.*—It is necessary in a complaint against the endorser of a promissory note, upon the endorsement, to set out a copy of the endorsement, but not necessary where the action is against the maker. *Eichelberger v. Old Nat'l Bank, 401*
9. *Same.—Averment of Title.*—The plaintiff may show title in himself by an averment that the note was endorsed to him. *Ib.*
10. *Same.—Sufficiency of Endorsement.—Defect of Parties.—Assignment of Errors.—Practice.*—If an endorsement is not sufficient, the question must be presented by demurrer for defect of parties; it can not be raised by an attack upon the complaint in the assignment of errors. *Ib.*
11. *Same.—Bona fide Holder not Affected by Notice to Endorser.*—Where the holder of a promissory note payable in bank acquires it in good faith, for value, before maturity and without notice, his rights are not affected by notice to his endorser of a defence thereto. *Ib.*
12. *Same.—Fraud.—Burden of Proof.*—Where the maker of a promissory note shows that it was obtained from him by fraud, the burden is

upon the party seeking to enforce its payment to show that he acquired it for value, before maturity and without notice. *Ib.*

13. *Same.—Signing Note in Blank.*—Where one signs a note in blank, leaving the principal debtor to fill in the amount that may be found due the payee on a settlement, the amount justly due the latter, although greater than represented, may be inserted without fraud. *Ib.*
14. *Discharge of Surety.—Notice to Sue.—Pleading.*—To a complaint on a promissory note, an answer by a surety, alleging that after the note became due he notified the plaintiff to institute suit thereon, but failing to allege that the plaintiff did not bring suit as required, and not averring any other fact as a reason for the defendant's release from liability, is bad on demurrer, an averment that the defendant was so released being a mere conclusion of law.

Marshall v. Mathers, 458

PROSECUTING ATTORNEY.

See CRIMINAL LAW, 8 to 10; INTOXICATING LIQUOR, 8.

QUIETING TITLE.

See DEED; INJUNCTION.

QUO WARRANTO.

See COUNTY COMMISSIONERS, 20; OFFICE AND OFFICER, 1.

RAILROAD.

See COMMON CARRIER; DAMAGES, 1, 2; DRAINAGE, 9 to 13; REAL ESTATE, 4, 5.

1. *Negligence.—Wilful Injury.—Pleading.*—Where the specific facts set out in a paragraph of complaint do not make a case of wilful injury, it will be treated as one charging negligence merely, notwithstanding general allegations of wilfulness. *Ivens v. Cincinnati, etc., R. W. Co., 27*
2. *Same.—Contributory Negligence.—Trespasser.—Signals.*—Where a person goes upon a railroad track between stations, at a place where he has no right to be, without looking or listening for approaching trains, and is injured, he can not recover against the company in the absence of wilfulness, notwithstanding a failure to give the signals required by law. *Ib.*
3. *Negligence.—Railroad Crossing.—Degree of Care.*—One who attempts to cross a railroad track must exercise care proportioned to the probable danger. *Cincinnati, etc., R. R. Co. v. Butler, 31*
4. *Same.—Personal Injury.—Contributory Negligence.—Statutory Signals.—Excessive Speed.—City Ordinance.*—One who is injured by a train while crossing the track of a railroad company will not be exonerated from the presumption of contributory negligence, because of the failure of those in charge of the train to give the statutory signals, or because the train was run at a rate of speed prohibited by a city ordinance, if it appears that by the exercise of proper diligence he might have avoided the injury. *Ib.*
5. *Same.—Negligence per se.*—The failure to give signals at a public crossing of the approach of a train is negligence *per se*, and fixes the liability of the railroad company to one who, without concurring negligence, is injured thereby. *Ib.*
6. *Same.—Plaintiff Must Affirmatively Show Injury not to be Result of Contributory Negligence.*—Contributory negligence is not a matter of defence in this State, and the plaintiff must show affirmatively, by pleading and proof, that his fault or negligence did not contribute to his injury, before he is entitled to recover therefor. *Ib.*

7. *Killing Animals.—Fences.—Action Before Mayor.—Possession of Road.—Complaint.*—A complaint against a railroad company before the mayor of a city, to recover damages for animals killed on the track of the railroad at a point where the same was not securely fenced, alleging that such animals "entered upon the said railway, and were then and there, by the locomotive, cars and carriages of the said defendant, killed," etc., sufficiently shows that the defendant was in possession of the road and operating the train. *Wabash, etc., R. W. Co. v. Lash, 80*
8. *Bill of Lading.—Contract.*—One who sues upon a contract contained in a bill of lading must recover, if at all, upon that contract.
Fry v. Louisville, etc., R. W. Co., 265
9. *Same.—Common Carrier.—Shipment at Reduced Rates.—Action for Overcharge. — Answer.*—A bill of lading for a car load of freight from Crawfordsville, Indiana, to Jamestown, Dakota, contained a guaranty that the rate should not exceed that specified in the bill, but it was stipulated that the rate was to be \$120 per car, and that the articles shipped were "for farm purposes." At the place of destination, which was on a connecting railroad owned by another company, the latter demanded, and was paid under protest, \$235 before delivering the property to the shipper. To a complaint against the contracting company on the contract, and for money had and received, to recover the overcharge, it was answered that by an arrangement with the company owning the connecting road, the latter would carry freight for farm purposes at the reduced rate given, and that the shipper falsely represented the property to be for farm purposes, upon discovering which fact the usual rate was charged.
Held, that the answer is sufficient on demurrer. Ib.
10. *Master and Servant.—Delegation of Master's Duties to Agent.—Negligence.—Liability of Master.*—Where a master delegates duties which the law imposes upon him to an agent, the latter, whatever his rank, in performing such duties acts as the master, and for an injury to an employee caused by the negligence of such agent, the master is liable.
Copper v. Louisville, etc., R. W. Co., 305
11. *Same.—Foreman.—Fellow Servants.*—A foreman, or other like agent, except where the master's duties are delegated to him, is a fellow servant with those under his immediate supervision, and for his negligence the master is not liable to a servant engaged in the same general service. *Ib.*
12. *Same.—Tunnel Repairer and Trainmen Fellow Servants.*—One engaged in the work of constructing and repairing tunnels upon the line of a railroad, who is injured while being carried from one point to another upon the line of the road, is a fellow servant with the engineer and other persons in charge of the train. *Ib.*
13. *Appropriation of Land.—Amendment of Instrument of Appropriation.—Damages.*—In a proceeding by a railroad company to appropriate land for a right of way, it has the right, upon cause shown, to amend the instrument of appropriation after the filing of the report of the appraisers and the joining of issues on exceptions thereto, by adding stipulations as to the maintenance by the company of fences and crossings calculated to reduce the amount of consequential damages.
Chicago, etc., R. W. Co. v. Jones, 386
14. *Same.—Injunction.—Pleading.—Practice.*—An application for an order restraining a railroad company from further proceedings in the matter of appropriating land for railroad purposes, must be based upon a complaint making a proper case for such relief. *Ib.*
15. *Same.—Appeal from Award of Appraisers.—Judgment for Damages.—Statute Construed.*—Under section 3907, R. S. 1881, on appeal from the

award of damages made by the appraisers in a proceeding to appropriate land for a right of way, the circuit court can only render judgment for the amount of compensation found due the owner, and a judgment enjoining the railroad company, on its failure to pay such amount within a certain time, from going upon or using such land until the same is paid, is erroneous. *Ib.*

16. *Contract.—Consideration.*—Where parties, in consideration of the benefits which will accrue to them by the construction of a railroad through a certain county and town, bind themselves in a sum sufficient to pay for the right of way across the county, they can not, after the road is so constructed, claim want or inadequacy of consideration to defeat the contract. *Chicago, etc., R. W. Co. v. Derkes, 520*
17. *Same.—Ultra Vires.*—One who has received from a corporation the full consideration of his agreement to pay money, can not avail himself of the objection that the contract is *ultra vires*. *Ib.*

RATIFICATION.

See COUNTY COMMISSIONERS, 16.

REAL ESTATE.

See CITY, 6 to 9; CONTRACT, 1 to 6, 8, 13; CRIMINAL LAW, 29, 30; DECEDENTS' ESTATES, 1; DEED; EASEMENT; ESTOPPEL, 1; EVIDENCE, 2; GUARDIAN AND WARD; INJUNCTION; JUDGMENT, 10, 13, 14; JUDICIAL SALE; LANDLORD AND TENANT; MARRIED WOMAN, 1 to 9; MECHANIC'S LIEN; MORTGAGE; NUISANCE; PARTITION; REAL ESTATE, ACTION TO RECOVER; SUBROGATION; TAXES; TRUST AND TRUSTEE; VENDOR AND PURCHASER.

1. *Judgments.—Conveyance.—Agreement to Pay Liens.—Mortgage.—Sheriff's Sale.—Merger.—Subrogation.—Equity.—Contract.—Negligence.*—The owner of real estate, against which existed judgment liens, sold it to B., who assumed the payment of such judgments as a part of the purchase-price. Without paying such liens, B. quitclaimed the land to C., who did not assume them. C. mortgaged the land to X., and after the mortgage was recorded he conveyed it by warranty deed to W., who had no actual knowledge of the X. mortgage, and who assumed the payment of the judgments. Subsequently, W. discovered the mortgage, and instead of paying the judgments he allowed the land to go to sale on them and obtained sheriff's deeds.
Held, that by the assumption W. became the principal debtor and primarily liable to pay the judgments.
Held, also, that W. could not acquire title as against X. through the sales made on the judgments, nor will they be kept alive for the purpose of protecting the title which he acquired from his grantor.
Held, also, that a court of equity will not relieve W. from an injudicious contract, negligently made and fully executed with knowledge of all the facts. *Birke v. Abbott, 1*
2. *Same.—Agreement of Grantee to Pay Encumbrances.*—The liability of a grantee, who assumes prior encumbrances, depends upon his contract, and not upon the liability of his grantor. *Ib.*
3. *Same.—Subrogation.*—A purchaser can not be subrogated to the benefit of an encumbrance which he has agreed to pay. *Peel v. Beers, 4 Ind. 46, and Ayers v. Adams, 82 Ind. 109, are distinguished. Ib.*
4. *Deed.—Easement.—Right of Way.—Railroad.—Title.*—A deed executed prior to May 6th, 1853, conveying to a railroad company "the right of way," of an undefined width, over certain real estate, such deed containing a stipulation that such company was to "have and hold the said rights and privileges to the use of said company so long as the same shall be required for the uses and purposes of said road,"

conveys nothing more than an easement in or right of way over the land, and not the fee simple. *Douglass v. Thomas*, 187

5. *Same.*—*Encumbrance.*—A right of way in favor of a railroad company constitutes an encumbrance on the land so occupied. *Id.*
6. *Same.*—*Pleading.*—*Counter-Claim.*—To an action to foreclose a mortgage given for the purchase-money of certain land, a counter-claim, alleging a failure of title, is not sustained by proof of the existence of an easement or right of way over the land. *Id.*

REAL ESTATE, ACTION TO RECOVER.

See NEW TRIAL, 2.

1. *Right to Possession.*—*Complaint.*—Under sections 1050 and 1054, R. S. 1881, a complaint to recover the possession of real estate, which fails to allege that the plaintiff is entitled to the possession, or facts showing such right, is bad both before and after verdict. *Mansur v. Streight*, 358
2. *Same.*—*Defect not Cured by Verdict.*—The omission from the complaint of a fact essential to the plaintiff's cause of action is not cured by verdict. *Id.*

RECOGNIZANCE.

1. *Forfeiture.*—*Surrender of Principal by Bail before Final Judgment.*—*Constitutional Law.*—*Case Distinguished.*—Section 1718, R. S. 1881, which provides that "The bail, at any time before final judgment against him upon a forfeited recognizance, may surrender his principal in open court or to the sheriff, and, upon payment of such costs as the court may adjudge to be paid by him, may thereupon be discharged from any further liability upon the recognizance," is constitutional. *Butler v. State*, 97 Ind. 373, distinguished. *State v. Rowe*, 118
2. *Same.*—*Remission of Fines and Forfeitures by Governor.*—Section 17, of article 5, of the State Constitution, investing in the Governor "power to remit fines and forfeitures," has reference to fines and forfeitures which have been adjudged, while section 1718 relates to the discharge of liability before judgment. *Id.*

RELIGIOUS SOCIETY.

See MECHANIC'S LIEN.

REMAINDER.

See GUARDIAN AND WARD; JUDICIAL SALE.

REPEAL OF STATUTE.

See CRIMINAL LAW, 11; JURY.

REPLEVIN.

See SUPREME COURT, 5.

1. *Complaint.*—*Affidavit.*—*Practice.*—In actions for the possession of personal property, the complaint, if it contains the statutory requisites and is verified, may subserve the two-fold purpose of complaint and affidavit, and its sufficiency as a cause of action may be tested by demurrer, and as an affidavit by motion to quash the order or writ issued thereon. *Louisville, etc., R. W. Co. v. Payne*, 183
2. *Same.*—*Detention.*—An affidavit for the possession of personal property which alleges that the property is *wrongfully*, instead of *unlawfully*, detained, as required by the statute, and does not charge that the detention is by the defendant, seems to be bad. *Id.*
3. *Same.*—*Property Held Under Execution.*—*Exemption.*—An execution defendant can not maintain an action for the recovery of personal prop-

erty held under the execution, except where the property is, by statute, exempt from execution. *Ib.*

4. *Same.*—*Void Execution and Judgment.*—*Pleading.*—A naked averment in the complaint, without more, that the execution and judgment are void is a mere conclusion. *Ib.*

RES ADJUDICATA.

See CITY, 7; FORMER ADJUDICATION; JUDGMENT, 2.

RESCISSION.

See CONTRACT, 13.

RESIGNATION.

See OFFICE AND OFFICER, 7.

RESPONDEAT SUPERIOR.

See COUNTY COMMISSIONERS, 5; RAILROAD, 10.

REVIEW OF JUDGMENT.

See JUDGMENT; PARTITION, 1.

REVIVAL.

See CONTRACT, 9, 10; CRIMINAL LAW, 11.

SALE.

See COUNTY COMMISSIONERS, 8 to 11, 14, 15, 18; DECEDENTS' ESTATES, 1; JUDICIAL SALE; MORTGAGE, 1, 3; PARTITION, 2; PRINCIPAL AND AGENT; VENDOR AND PURCHASER, 2.

SCHOOL FUND.

1. *Expense of Management.*—The Constitution requires the counties to bear the expense of managing the school fund.
Board, etc., v. State, ex rel., 497
2. *Same.*—*Action Against County.*—An action will lie against a county for money paid out of the school fund to its officers for managing such fund. *Ib.*
3. *Same.*—*Direct Trust.*—*Statute of Limitations.*—The county in receiving and disbursing the school fund acts as the trustee of a direct trust, and against such a trust the defence of the statute of limitations can not be interposed. *Ib.*
4. *Same.*—*Settlement Between Board of Commissioners and County Officer Does not Conclude State.*—A settlement between the board of commissioners and a county auditor, or other county officer, does not conclude the State from maintaining an action to recover school funds unlawfully paid to an officer by the board. *Ib.*

SET-OFF.

See PLEADING, 8.

Demands Must be Mutual.—*Finding by Jury.*—To make one demand a set-off against another, both must mutually exist between the same parties; but where the mutuality is disputed, and there is evidence from which the jury may find that the transactions were between the same parties, its finding of such fact will not be disturbed.

Talmage v. Bierkaue, 270

SHERIFF'S SALE.

See JUDICIAL SALE; MORTGAGE, 3; REAL ESTATE, 1; VENDOR AND PURCHASER, 2.

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SHORT-HAND REPORTER.

See CRIMINAL LAW, 20.

SIGNATURE.

See CRIMINAL LAW, 8 to 10, 37.

SITUS.

See TAXES, 4, 5.

SPECIAL FINDING.

1. *Secundum Allegata et Probata*.—*Practice*.—*Pleading*.—A plaintiff can recover only upon the case stated in his complaint; and where the court specially finds in his favor facts showing a cause of action substantially different from that stated in the complaint, he can not recover in that suit. *Brown v. Will, 71*
2. *General Verdict*.—Special findings of facts by the jury not irreconcilably inconsistent with their general verdict will not overcome the latter. *Perry v. Makemson, 300*

SPECIFIC PERFORMANCE.

See CONTRACT, 8.

STATUTE.

See ABATEMENT, 1; ACTION, 3; ANIMALS, 1, 2; ASSIGNMENT FOR BENEFIT OF CREDITORS; ATTORNEY AND CLIENT; COSTS; COUNTY COMMISSIONERS, 1, 2, 13, 14, 16; CRIMINAL LAW, 5, 8, 10 to 12, 17, 23, 24, 26, 32, 34, 46, 49, 50; DAMAGES, 1, 4, 7; DECEDENTS' ESTATES; DEDICATION, 3; DRAINAGE, 2, 10; GUARDIAN AND WARD; HABEAS CORPUS, 1; INTOXICATING LIQUOR, 3; JUDGMENT, 5, 6; JUDICIAL SALE; JURY; MANDATE, 2; MARRIED WOMAN, 1 to 5, 12; MORTGAGE, 3; NEW TRIAL, 2 to 4; PARENT AND CHILD; REAL ESTATE, ACTION TO RECOVER, 1; RECOGNIZANCE; TAXES, 1 to 3; TELEGRAPH COMPANY, 1, 2, 14 to 16; TRUST AND TRUSTEE, 2.

STATUTE CONSTRUED.

See ATTACHMENT, 5; COUNTY COMMISSIONERS, 21; DAMAGES, 4; DECEDENTS' ESTATES, 5; JURY; MARRIED WOMAN, 12; RAILROAD, 15; TAXES, 1 to 3; TELEGRAPH COMPANY, 10; TOWN, 1.

STATUTE OF FRAUDS.

See CONTRACT, 2, 3, 6; PARTITION, 1.

STATUTE OF LIMITATIONS.

See JUDGMENT, 5, 6; OFFICE AND OFFICER, 5; SCHOOL FUND, 3; TAXES, 6.

1. *Money Received by Public Officers*.—*Trusts*.—The mere receipt of money under claim and color of right by public officers, does not constitute them trustees in such a sense as to bar the defence of the statute of limitations. *Newsom v. Board, etc., 526*
2. *Same*.—*Taxes Illegally Collected*.—An ordinary action may be maintained to recover taxes illegally assessed and collected. *Id.*
3. *Same*.—*When Statute of Limitations a Valid Defence*.—Where money can be recovered in an ordinary action, the statute of limitations is a valid defence. *Id.*
4. *Same*.—*Can not be Made to Direct Trusts*.—*Equity*.—It is only to direct trusts, exclusively cognizable by courts of equity, that the defence of the statute of limitations can not be made. *Id.*
5. *Same*.—*Demand*.—Where a demand is necessary to mature a cause of action, it must be made before the statute of limitations has run, to be available. *Id.*

6. *Same*.—A demand is not essential to create a cause of action for taxes illegally collected. *Ib.*

STREET.

See CITY; DEDICATION; TOWN, 1.

SUBMISSION OF CAUSES.

See SUPREME COURT, 23.

SUBROGATION.

See CONTRACT, 13; REAL ESTATE, 1, 3; VENDOR AND PURCHASER, 2.

- A purchaser can not be subrogated to the benefit of an encumbrance which he has agreed to pay. *Peel v. Beers*, 4 Ind. 46, and *Ayers v. Adams*, 82 Ind. 109, are distinguished. *Birke v. Abbott*, 1

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See CITY, 1; CRIMINAL LAW, 2, 3, 14, 43, 48; DECEDENTS' ESTATES, 2; DRAINAGE, 1, 3, 4, 6; HABEAS CORPUS, 3; INSTRUCTIONS TO JURY, 2; NEW TRIAL, 2, 3; PLEADING, 13; PRACTICE, 6, 10, 11; TELEGRAPH COMPANY, 13.

1. *Terms of Courts*.—The Supreme Court takes judicial knowledge of the terms of the circuit courts of this State. *McCrory v. Anderson*, 12
2. *Practice*.—*Record*.—*Objections to Testimony*.—The record must set forth the objections to testimony that were stated to the trial court, and only these objections can be urged in the Supreme Court. *Shaffer v. Ferguson*, 90
3. *Same*.—*Objections Must be Specifically Stated*.—Objections must be specifically stated, to be available. *Ib.*
4. *Practice*.—*Brief*.—*Waiver*.—A question not made in the original brief of appellant, nor until the brief of the appellee has been filed and the case taken up for consideration by the court, may be considered as waived. *Western U. Tel. Co. v. Ferris*, 91
5. *Practice*.—*Cause for New Trial*.—*Assignment of Error*.—A ruling upon a motion to quash a writ of replevin is not a cause for a new trial, and, to present a question as to such ruling to the Supreme Court, an independent assignment of error is necessary. *Nafe v. Leiter*, 138
6. *Complaint*.—*Assignment of Error*.—A question as to the sufficiency of a complaint will not be considered by the Supreme Court unless properly presented by an assignment of error. *Indiana, etc., R. W. Co. v. Maddy*, 200
7. *Objections to Pleadings*.—*Practice*.—*General Rule*.—It is the rule that if the sufficiency of a pleading is not questioned in the trial court, it can not be assailed on appeal. *City of Evansville v. Martin*, 206
8. *Same*.—*Statutory Exception*.—*Complaint*.—An objection may be made to a complaint for the first time in the Supreme Court only because the statute so provides. *Ib.*
9. *Same*.—*Answer Must be Objected to in Trial Court*.—The sufficiency of an answer can not be questioned for the first time by an assignment of error in the Supreme Court. *Ib.*
10. *Weight of Evidence*.—The Supreme Court will not disturb a verdict on the weight or preponderance of the evidence. *Phillips v. Thorne*, 275
11. *Joint Assignment of Error*.—A joint assignment of error must be good as to all or it is not good as to any. *Thomson v. Madison, etc., Ass'n*, 279
12. *Same*.—*Objections to Evidence*.—*Practice*.—Objections to evidence which are not stated in the bill of exceptions can not be considered on appeal. *Ib.*

13. *Instructions to Jury.—Absence of Evidence from Record.—Presumption.*—Where the evidence is not in the record, the judgment will not be reversed on account of an instruction if the latter would be correct upon any state of the evidence which might have been properly before the jury, as in such case it will be presumed that the instruction was applicable. *Elkhart, etc., Ass'n v. Houghton, 286*
14. *Weight of Evidence.*—The Supreme Court will not disturb the general verdict of the jury upon the weight of the evidence. *Perry v. Makemson, 300*
15. *Same.—Instructions.—Harmless Error.*—Error in any one or more instructions given by the trial court is not sufficient ground for the reversal of a judgment which is right on the evidence. *Ib.*
16. *Joint Assignment of Error.—Practice.*—An alleged separate error against one of several appellants is not presented on appeal by a joint assignment of error by all. *Tucker v. Conrad, 349*
17. *Weight of Evidence.—Practice.*—A judgment will not be reversed upon conflicting evidence. *Eichelberger v. Old Nat'l Bank, 401*
18. *Harmless Error.—Practice.*—A harmless error is not available for the reversal of the judgment. *McGee v. State, ex rel., 444*
19. *Practice.—Weight of Evidence.*—The Supreme Court will not reverse a judgment upon the weight of the evidence where there is evidence tending to sustain the finding of the lower court. *Vaughan v. Godman, 499*
20. *Appeal.—Costs.*—One who resists the granting of a new trial, and takes a final decree upon a defective finding of facts and erroneous conclusions of law, will, on appeal by the other party, be taxed with the costs of the same, although on such appeal he is adjudged to be entitled to a greater relief than that granted below. *Thomas v. Simmons, 538*
21. *Reversal Upon Cross Errors.*—A judgment will not be reversed upon cross errors where the appellee insists upon an affirmance. *Ib.*
22. *Practice.—Error Must Affirmatively Appear.*—A party who alleges error must present a record affirmatively showing it; otherwise all reasonable presumptions will be made in favor of the proceedings of the trial court. *Graves v. Duckwall, 560*
23. *Submission under Rule 39.—Failure to File Objections.—Waiver.*—The submission provided for in Rule 39 of the Supreme Court is a statutory or forced submission, brought about by operation of law, and by a mere failure to file objections to a submission under such rule a party does not waive any right which he would otherwise possess. *Heller v. Clark, 591*

SURETY.

See CONTRACT, 13; MARRIED WOMAN, 1 to 9; OFFICE AND OFFICER, 3; PARTITION, 2; PROMISSORY NOTE, 14; RECOGNIZANCE.

SURVIVAL.

See ACTION, 3; DAMAGES, 7; TELEGRAPH COMPANY, 3.

TAXES.

See GRAVEL ROAD, 3; INJUNCTION, 2; STATUTE OF LIMITATIONS.

1. *Trust Estates.—Administrator.—Delinquent Taxes.—County Treasurer's Statement to Court.—Pleading.—Demurrer.*—Section 6443, R. S. 1881, requiring the county treasurer, upon the failure of an administrator, etc., to pay taxes due from the estate which he represents, to present a statement to the proper court, setting forth the facts and amount of such delinquency, does not deprive such administrator of the right to test the sufficiency of such facts by demurrer. *Lang v. Clapp, 17*
2. *Same.—Special Assessment of Omitted Property.—Act of Dec. 21st, 1872.—*

Special assessments of omitted property by the county auditor or treasurer, except for the current year, were not authorized by the assessment law of December 21st, 1872, or any of its amendments. *Ib.*

3. *Same.—Act of March 29th, 1881.—Construction.*—Section 147 of the new tax law of March 29th, 1881 (sec. 6416, R. S. 1881), is only prospective in its operation, and does not authorize the county auditor to make a special assessment of omitted property for any year, or number of years, prior to its passage or taking effect. *Ib.*
4. *Personal Property.—When Deemed in Transitu.*—Where property is collected from one or more points, by any means of transportation, and is awaiting the necessary preparation and facilities for further transportation, it will be deemed to be in transit while so detained, and not liable to taxation. *Board, etc., v. Standard Oil Co., 302*
5. *Same.—Property Intended for Transportation.—Situs.*—But where property is collected, even though it may be at the point of final shipment, to await indefinitely the owner's pleasure or the rise of markets, or to undergo a partial process of manufacture, or from any other cause having no relation to the preparation for or facilities or exigencies of transportation, it will be held to have acquired a *situs*, making it subject to taxation. *Ib.*
6. *Taxes Illegally Collected.—Statute of Limitations.*—An ordinary action may be maintained to recover taxes illegally assessed and collected, and in such actions the statute of limitations is a valid defence. *Newsom v. Board, etc., 526*
7. *Demand.*—A demand is not essential to create a cause of action for taxes illegally collected. *Ib.*

TAXPAYER.

See CITY, 10.

TELEGRAPH COMPANY.

1. *Failing to Transmit Message to Point Without the State.—Statutory Penalty.—Constitutional Law.*—Section 4176, R. S. 1881, prescribing a penalty against telegraph companies for failing to transmit a message, is valid and constitutional, whether the message is to a point within or without the limits of this State. *Western U. Tel. Co. v. Ferris, 91*
2. *Pleading.—Answer.*—To a complaint against a telegraph company, to recover the statutory penalty, alleging that such company received and failed to transmit a message for which the usual charge had been paid, an answer averring that a message was seasonably transmitted, but not identifying it in any way as the message referred to in the complaint, is bad. *Ib.*
3. *Action for Penalty Survives.*—A cause of action against a telegraph company to recover the statutory penalty for a breach of duty does not die with the original party in interest, but survives to his representatives. *Western U. Tel. Co. v. Scirelle, 227*
4. *Same.—Statutory Action.—Pleading and Proof.*—Where an action is founded on a statute, the plaintiff need only allege and prove such facts as bring the case within the statute. *Ib.*
5. *Same.—Complaint.—Telegraphing for Hire.*—Where the complaint alleges that the defendant was engaged in telegraphing for the public, it is sufficient under the statute without alleging that it was for hire. *Ib.*
6. *Same.—Rule Limiting Time for Filing Claims is an Affirmative Defence.*—A defence, founded upon a rule of the corporation limiting the time within which claims shall be presented, is an affirmative one and not available under the general denial. *Ib.*

7. *Same.—Delay in Transmitting Message.—Burden of Proof.*—Where the sender of the message proves that there was an unreasonable delay, the burden of explaining the delay is upon the company. *Ib.*
8. *Same.—Diligence.*—A delay of several hours in transmitting a message that only requires from five to fifteen minutes for its transmission, shows a want of diligence. *Ib.*
9. *Same.—Duty of Company to Provide Proper Assistance.*—Where the business of an office is such that one operator can not receive messages with reasonable promptness, it is the duty of the company to supply the required assistance. *Ib.*
10. *Statutory Remedy.—Construction.*—A statute giving a remedy is to be construed as giving it to one entitled to recover under the general rules of law, unless it is otherwise expressed in the statute itself.
Western U. Tel. Co. v. McDaniel, 294
11. *Same.—Contributory Negligence Bars Recovery of Statutory Penalty.*—Contributory negligence in the sender of a message will bar a recovery of the statutory penalty for a breach of duty. *Ib.*
12. *Same.—Facts Constituting Contributory Negligence.*—Where the sender of a message directs it "To Mrs. La Fountain, Kankakee," a city of twelve or fifteen thousand inhabitants, and fails, upon having his attention called to the fact by the agent of the telegraph company, to make the name more definite, or to give the street and number of her residence, he is guilty of contributory negligence. *Ib.*
13. *Same.—Province of Supreme Court.*—Upon an indisputable state of facts, it is the province of the Supreme Court to pass upon the question of the defendant's negligence. *Ib.*
14. *Power to Regulate Office Hours.*—Under section 4176, R. S. 1881, a telegraph company may regulate, reasonably, its office hours according to the requirements of the business at the various points where it holds itself out for public service. *Western U. Tel. Co. v. Harding, 505*
15. *Same.—Failure to Transmit.—Statutory Penalty.*—The penalty for failing to seasonably transmit a message is not incurred unless there is a failure to receive and transmit during the usual office hours, both at the point where the message is received and that to which it is transmitted. *Ib.*
16. *Same.—Information to Agents as to Office Hours at Different Points.*—To avoid the statutory penalty, it is not necessary that a telegraph company should keep its agents at all points informed concerning the office hours at all other points, so that the sender of a message may be voluntarily apprised of any probable delay in its transmission on that account. But it seems that a case might arise where the company would be bound to ascertain and disclose its inability to transmit the message speedily or be liable in damages. *Ib.*

TENDER.

Refusal to Hear Tender.—One who, by his own conduct, prevents a full tender being made to him, can not afterwards complain that the tender made was not sufficiently specific. *Platter v. Board, etc., 360*

TITLE.

See CRIMINAL LAW, 29, 30; EASEMENT; INJUNCTION, 1; OFFICE AND OFFICER, 7, 8; PROMISSORY NOTE, 4, 6, 9; REAL ESTATE, 4, 6.

TORT.

See MARRIED WOMAN, 10; NEGLIGENCE.

TOWN.

See DEDICATION.

1. *Election of Trustees.—Delay in Filing Certificates of Election by Inspectors.—Filing After Time Limited by Law.—Effect on Acts of Board.—Statute Construed.—Street Improvements.—Cases Overruled and Distinguished.*—At a town election for 1881, and also for 1882, held in May of each year, certain persons were elected town trustees, but the certificates of their election were not filed by the inspectors with the clerk of the circuit court until July 9th, 1883, although the statute (section 3309, R. S. 1881) provides that such certificates shall be filed within ten days from the day of the election, and that "no act or ordinance of any board of trustees chosen at such election shall be valid until the provisions of this section are substantially complied with."

Held, that the effect of the filing of the certificates on June 9th, 1883, was to legalize and validate, from their inception, ordinances and contracts for street improvements previously made by the board of trustees of such town, and to authorize the recovery of assessments thereunder. *Dinwiddie v. Board, etc.*, 37 Ind. 66, distinguished, and *Town of Ligonier v. Ackerman*, 46 Ind. 552, and *Pratt v. Luther*, 45 Ind. 250, overruled so far as they conflict with this opinion. *Jennings v. Fisher*, 112

2. *Power to Employ Counsel to Defend Action Against Marshal.*—The board of trustees of a town in this State have incidental power to employ counsel to defend an action for false imprisonment brought against the town marshal by one arrested by him for the violation of a town ordinance, and a claim for services rendered under such employment may be enforced in an action against the town.

Cullen v. Town of Carthage, 196

TRANSCRIPT.

See BILL OF EXCEPTIONS; CRIMINAL LAW, 4; DECEDENTS' ESTATES, 2.

TRESPASS.

See GUARDIAN AND WARD; RAILROAD, 2.

Abating Nuisance.—Where one creates a dangerous nuisance upon the property of another, the latter, for the purpose of abating it, may go upon the property of the former without becoming a trespasser.

Mayhew v. Burns, 328

TRIAL.

See MANDATE, 2.

TRUST AND TRUSTEE.

See ASSIGNMENT FOR BENEFIT OF CREDITORS; BANKS AND BANKING; PARTITION, 1; SCHOOL FUND; STATUTE OF LIMITATIONS, 1, 4; TAXES, 1; TOWN.

1. *Power to Lease Trust Property.*—Trustees possess general power to lease trust property, if the lease does not exceed the quantity of estate vested in them as trustees, and is a reasonable one.

City of Richmond v. Davis, 449

2. *Same.—Devise to Charitable Uses.—Perpetuities.*—A devise for a charitable purpose is in its nature perpetual, and does not come within the provisions of the statute against perpetuities, section 2962, R. S. 1881. *Ib.*

3. *Same.—Perpetual Leases.—Municipal Corporation.—Order of Court.—Want of Power.*—Where trustees of real estate devised in trust for a charitable use executed perpetual leases of such real estate to a municipal corporation for corporate purposes, such leases are not void because of the want of power in the trustees to execute them, nor are they void for the reason that the leases were not ordered or confirmed by the proper court. *Ib.*

4. *Same.—Action to Set Aside Leases.*—It is the general rule that trustees of land devised to a charitable use should only lease for years, unless ordered by the proper court to lease for a longer term; but leases for lives or long periods, though executed without the sanction of the court having the control of the trust, will not be set aside in a collateral attack or at the suit of a stranger, unless they are so clearly unreasonable or detrimental to the beneficiaries that a court will not allow the leases to stand. *Id.*
5. *Same.—Equity.—Rights of Lessee.*—Equity will protect the rights of lessees who, acting under perpetual leases of real estate devised to charitable uses, have in good faith made permanent improvements, where such leases are set aside on the application of the proper parties. *Id.*

TURNPIKE.

See GRAVEL ROAD.

ULTRA VIRES.

See PROMISSORY NOTE, 7; RAILROAD, 17.

USER.

See DEDICATION; HIGHWAY, 10.

VARIANCE.

See CRIMINAL LAW, 40; HIGHWAY, 8.

VENDOR AND PURCHASER.

See COUNTY COMMISSIONERS, 8 to 15; DEED; EASEMENT; PRINCIPAL AND AGENT; REAL ESTATE; SUBROGATION.

1. *Distinction Between Assuming and Taking Subject to Encumbrance.*—Where the purchaser of real estate assumes the payment of a mortgage thereon, he makes himself personally liable for the debt; but where he simply buys subject to the mortgage, he does not become so liable. In both cases, however, he takes the land charged with the debt.

Hancock v. Fleming, 533

2. *Same.—Sheriff's Deed.—Merger.—Subrogation.—Mortgage.—Foreclosure.—Equity.—Notice.*—Where one takes a deed to real estate subject to, but without agreeing to pay, a mortgage thereon, and without actual notice of any other encumbrance, he can not defeat the mortgage lien by obtaining a sheriff's deed under a sale on a prior judgment, as the title thus taken merges in that previously held, although equity will keep such judgment alive for his protection, and a foreclosure must be had subject to it. *Id.*

VENIRE DE NOVO.

See PRACTICE, 9.

VERDICT.

See SPECIAL FINDING.

VOLUNTARY ASSIGNMENT.

See ASSIGNMENT FOR BENEFIT OF CREDITORS.

WAGER.

See CRIMINAL LAW, 5 to 7.

WAIVER.

See DRAINAGE, 4, 17; HIGHWAY, 2, 4; JURISDICTION, 2; LANDLORD AND TENANT, 3; PLEADING, 8; SUPREME COURT, 4, 23.

WARRANTY.

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WILL.

See JUDGMENT, 10; PARTITION, 1; TRUST AND TRUSTEE, 2 to 5.

WITNESS.

See CRIMINAL LAW, 41, 42; EVIDENCE.

WORDS AND PHRASES.

See BANKS AND BANKING, 3; COMMON CARRIER, 4; COUNTY COMMISSIONERS, 15; CRIMINAL LAW, 32; INTOXICATING LIQUOR, 1; MARRIED WOMAN, 2; REPLEVIN, 2.

END OF VOLUME 103.

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